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FEDERAL SECTOR NEGOTIABILITY

BY

MICHAEL L. COLOGY

Graduate Elective Research
LAWG86413
Professor Aronin

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FEDERAL SECTOR NEGOTIABILITY

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MICHAEL L. COLOGY

I. INTRODUCTION

This article will examine the negotiability of labor-management issues under the Civil Service Reform Act of 1978 (hereinafter the Act).¹ A brief examination will be made of federal sector negotiability prior to codification of federal collective bargaining in the Act. The relevant statutory provisions governing negotiability will be set forth and surveyed. The decisions and policies of the Federal Labor Relations Authority (hereinafter the Authority) and court decisions will be examined. This paper will examine the tests that the Authority utilizes to determine whether a proposal is negotiable and whether these tests provide meaningful guidance to federal agencies and the exclusive representatives of federal employees. Several specific subject areas will be examined to provide the reader with insights into how negotiability issues are decided. It is beyond the scope of this paper to examine how the failure to negotiate in good faith may constitute an unfair labor practice under the Act.² (SDW)

II. NEGOTIABILITY IN THE FEDERAL SECTOR PRIOR TO THE ACT

In January, 1962, President John Kennedy issued Executive Order

1. Pub. L. No. 95-454, 92 Stat. 1191.

2. 5 U.S.C. Sec. 7116(a)(5) (1982).

10,988, Employee-Management Cooperation in the Federal Service.³

The Order established policies for labor-management relations in the federal government. Employees were permitted to join employee organizations⁴ and to negotiate with federal agencies on limited subjects.⁵ Deficiencies in labor-management were recognized and in August, 1969, President Richard Nixon issued Executive Order 11,491, Labor-Management Relations in the Federal Service.⁶ The scope of negotiations was expanded to include negotiations over "personnel policies and practices and matters affecting working conditions"⁷ and specifically provided that "appropriate arrangements" could be made for employees adversely affected by work force realignment or technological change.⁸ However, the scope of negotiations was not unlimited as management retained certain rights which were not subject to negotiations and collective bargaining agreements could not contravene existing laws or regulations issued by appropriate authorities.⁹ The Federal Labor Relations Council (FLRC), composed of the Chairman of the Civil Service Commission, the Secretary of Labor, and the Director of the Office of Management and Budget, was given responsibility to administer and interpret the Executive Order

3. Executive Order No. 10,988, 3 C.F.R. 521 (1959-1963 Comp.).

4. Id., Sec. 1(a).

5. Id., Sec. 6(b).

6. Exec. Order 11,491, 34 F.R. 17,605, 29 October 1969.

7. Id., Sec. 11a.

8. Id., at Sec. 11b.

9. Id., at Sec 12.

including hearing negotiability appeals.¹⁰ Many held the view that the FLRC was too pro-management and overly restricted the scope of bargaining.¹¹

III. CODIFICATION OF FEDERAL LABOR-MANAGEMENT RELATIONS

In October, 1978, the Civil Service Reform Act was passed. Title VII of the Act is titled "Labor-Management And Employee Relations" and governs labor relations in the federal sector.¹² Congress found that the statutory protection of the right of employees to organize and bargain collectively is in the public interest and contributes to the effective conduct of government.¹³ Congress also stated that federal labor-management relations must be conducted in a manner so as to permit the "effective and efficient" operation of government.¹⁴

Employees are statutorily permitted to join labor organizations and bargain collectively over "conditions of employment" except as otherwise provided in Title VII.¹⁵ Conditions of employment are defined in the Act as:

[P]ersonnel policies, practices, and matters, whether established

10. Id., at Sec. 4

11. 124 Cong. Rec. 29,187 (1978) (statement of Congressman Clay).

12. 5 U.S.C. Sec 7101, et seq. (1982 & Supp V 1987).

13. 5 U.S.C. Sec. 7101(a)(1) (1982).

14. 5 U.S.C. Sec 7101(b) (1982).

15. 5 U.S.C. Sec. 7102 (1982).

by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters-

- (A) relating to political activities prohibited under subchapter 73 of this title;
- (B) relating to classification of any position;
- (C) to the extent such matters are specifically provided for by Federal statute.¹⁶

Further restrictions on the scope of bargaining are contained in the statute under the management rights provision.¹⁷ As the majority of this paper examines the meaning of this provision it is set forth in its entirety:

- (a) Subject to subsection (b) of this section nothing in this chapter shall affect the authority of any management official of any agency-
 - (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency: and
 - (2) in accordance with applicable laws-
 - (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
 - (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
 - (C) with respect to filling positions, to make selections from appointments from-
 - (i) among properly ranked and certified candidates for promotion; or
 - (ii) any other appropriate source; and
 - (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.
- (b) Nothing in this section shall preclude any agency and any labor organization from negotiating-
 - (1) at the election of the agency, on the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project,

16. 5 U.S.C. Sec 7103(a)(14) (1982); See Section VI infra for a discussion concerning conditions of employment.

17. 5 U.S.C. Sec. 7106 (1982).

or tour of duty, or on the technology, methods, and means of performing work;
(2) procedures which management officials of the agency will observe in exercising any authority under this section; or
(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.¹⁸

Further restrictions are placed upon the scope of bargaining as the duty to bargain does not extend to any matter inconsistent with a Government-wide regulation or an agency rule or regulation if the Authority has determined that a compelling need exists for the agency rule or regulation.¹⁹

In addition to the scope of bargaining being different from the private sector, further differences are also incorporated in the statute. In the private sector, if a subject matter is negotiable it is left to the parties to come to an agreement and the terms of an agreement cannot be determined by a third party without the consent of the parties.²⁰ However, under the Act if a subject is determined to be negotiable and the parties are unable to reach agreement and impasse occurs, the issue can be taken to the Federal Services Impasse Panel which has the authority to determine the substance of the agreement between the parties.²¹ An agency head retains the right to review provisions of a collective bargaining

18. Id.

19. 5 U.S.C. Sec. 7117(a) (1982).

20. 29 U.S.C. Sec. 158(d); Sec. 8(d) of the National Labor Relations Act (1982 & Supp V 1987).

21. 5 U.S.C. Sec. 7119 (1982).

agreement imposed by the Federal Services Impasse Panel²² or a single member of the panel sitting as its designee²³ and to reject those she determines are contrary to law, rule, or regulation.

Agreements below agency level are subject to review by the agency head to insure that it complies with law, rule, and regulation. If the agency head determines that the agreement violates one of these areas the agency head has authority to disapprove this portion of the agreement reached between the parties.²⁴

Pursuant to the Act the Federal Labor Relations Authority was established to provide policy and guidance in federal labor-management relations.²⁵ The Authority is patterned after the National Labor Relations Board.²⁶ Courts have used this to apply private sector case law to certain issues arising under the Act.²⁷ Unlike its predecessor, the Federal Labor Relations Council, the

22. Interpretation and Guidance, Case No. O-PS-28, 15 F.L.R.A. 564 (1984).

23. Department of Defense Dependents School, Alexandria, Virginia v. Federal Labor Relations Authority, 852 F.2d 779 (4th Cir. 1988) rev'g Department of Defense Dependents Schools (Alexandria, Virginia) and Overseas Federation of Teachers, AFT, AFL-CIO, 27 F.L.R.A. 586 (1987); Panama Canal Commission v. Federal Labor Relations Authority, 867 F.2d 905 (5th Cir. 1989).

24. 5 U.S.C. Sec. 7115(c) (1982).

25. 5 U.S.C. Sec 7105(a) (1982).

26. Senate Report No. 95-969, 95th Cong., 2d Sess. 102, reprinted in 1978 U.S. Code Cong. & Ad. News, 2819, 2824, 2828.; House Representatives Report No. 95-1403, 95th Cong., 2d Sess. 41-42 (1978).

27. Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982) (holding that the Authority had unreviewable discretion when deciding whether or not to issue an unfair labor complaint).

Authority is an impartial bipartisan body consisting of three members.²⁸

The Authority is responsible for resolving the negotiability of proposals.²⁹ A finding of negotiability by the Authority does not mean that the Agency must accept the proposal in question, but only that the agency must enter negotiations on the issue involved and that nothing in law, rule, or regulation would prevent the parties from agreeing to the clause in issue.

The Act provides that negotiability appeals will be heard in an expedited procedure and the Authority is required to provide the agency and the exclusive representative a written decision on the allegations supported by specific reasons at the earliest possible time.³⁰ Despite this clear emphasis placed upon swift resolution of negotiability disputes the Authority has not always been able to render negotiability decisions as quickly as many would like. The Authority rejected an amendment to its regulations which would require negotiability decisions to be made within sixty days while reaffirming its goal of rendering all negotiability appeals within six months of receipt.³¹ A petition for a writ of mandamus to compel the Authority to issue all negotiability opinions within six months of filing was denied as the court found nothing in the Act which

28. 5 U.S.C. Sec. 7104(a) (1982).

29. 5 U.S.C. Sec. 7117 (1982).

30. 5 U.S.C. Sec. 7117(c)(5) (1982).

31. Decision on Petition for Amendment of Rules, 23 F.L.R.A. 405 (1986).

would support establishment of a deadline for rendering negotiability opinions.³²

Negotiability decisions of the Authority are reviewable by an aggrieved party in the United States court of appeals in the circuit in which the person resides or transacts business or in the Court of Appeals for the District of Columbia Circuit.³³ The Authority may also petition any appropriate United States court of appeals for enforcement of its final orders.³⁴ As any party can appeal to the Court of Appeals for the District of Columbia Circuit, it has issued numerous opinions on negotiability and is really the first among equals. Consequently, the Authority has adopted rulings of the D.C. Circuit on numerous issues to be the standard it will apply in future cases.³⁵

Although the negotiability decisions of the Authority are subject to court review, the Authority's decisions are given considerable deference by the courts. The Act provides³⁶ that

³². In re American Federation of Government Employees, AFL-CIO, 837 F.2d 503 (D.C. Cir. 1988).

³³. 5 U.S.C. Sec. 7122(a) (1982).

³⁴. 5 U.S.C. Sec. 7123(b) (1982).

³⁵. See E.g.; Internal Revenue Service and National Treasury Employees Union, 29 F.L.R.A. 162 (1987) (mid-term bargaining); National Union of Hospital and Health Care Employees, AFL-CIO, District 1199 and Veterans Administration Medical Center, Dayton, Ohio, 33 F.L.R.A. 281 (1988) (negotiability of labor issues by medical staff employed by VA); National Association of Government Employees, Local R14-87 and Kansas City National Guard, 21 F.L.R.A. 24 (1986) ("excessive interference" test for adversely affected employees).

³⁶. 5 U.S.C. Sec. 7123(c) (1982).

judicial review of Authority decisions will be in accordance with 5 U.S.C. Section 706 (part of the Administrative Procedure Act) which requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be ...arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."³⁷ The Supreme Court has interpreted this provision as requiring that a court normally give "considerable deference" to the Authority's interpretation of its enabling statute.³⁸ However, the Supreme Court cautioned that "while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, they must not 'rubber-stamp... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'"³⁹ Despite the relaxed standard of review, courts of appeals have reversed decisions of the Authority on numerous occasions.

IV. PROCEDURAL REQUIREMENTS FOR NEGOTIABILITY DETERMINATIONS

Pursuant to the authority vested in it, the Authority has issued regulations which govern the procedures to be used in negotiability appeals.⁴⁰ The Authority strictly construes its regulations and

³⁷. 5 U.S.C. Sec. 706(2) (1982).

³⁸. Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97, 104 S. Ct. 439, 444, 78 L.Ed. 2d 195 (1983).

³⁹. Id., 464 U.S. at 97, 104 S. Ct. at 444.

⁴⁰. 5 C.F.R. Sec. 2424.1 et seq.

failure to comply will result in dismissal of the case⁴¹ or limiting the issues considered if a party did not raise them in a timely manner.⁴² In an effort to expedite resolution of disputes concerning the negotiability of the substance of a proposal, the Authority restricts consideration of unfair labor practice charges for failure to bargain⁴³ to those cases involving actual or contemplated changes in conditions of employment.⁴⁴

V. OBLIGATION TO BARGAIN

Federal agencies and exclusive representatives are under an obligation to bargain in good faith in an effort to reach agreement.⁴⁵ An agency must afford the employee's exclusive employees an opportunity to engage in impact and implementation

41. 5 C.F.R. Sec. 2429.23(d) (provides that the time limits contained in 5 U.S.C. Sec 7117(c)(2) are jurisdictional in nature and cannot be waived); See AFGE Local 491 v VA Medical Center, Bath NY, 28 F.L.R.A. 30 (1987) (dismissal of case where Union petition was filed four days late even though it may have been delayed by Christmas mail).

42. 5 C.F.R. Secs. 2424.4 ,2424.6, and 2424.8.

43. 5 U.S.C. Sec. 7116(a)(5) (1982).

44. 5 C.F.R. Sec. 2424.5; National Labor Relations Board Union v. Federal Labor Relations Authority, 834 F.2d 191 (D.C. Cir. 1988) (affirming the Authority's decision not to amend its regulations to permit unfair labor charges to be pursued where there is no change in conditions of employment).

45. 5 U.S.C. Sec. 7103(a)(12) (1982).

bargaining before implementing a change in working conditions.⁴⁶ The Authority initially took the position that the duty to bargain only extended to negotiations leading to a basic collective bargaining agreement and midterm proposals made by management, but not to midterm proposals initiated by the union.⁴⁷ Applying by analogy private sector case law, the Court of Appeals for the District of Columbia Circuit reversed this policy finding that the obligation to bargain exists as to mid-term proposals initiated by the union as it would foster collective bargaining in the federal sector by furthering the statutory goal of equalizing the positions of unions and management at the bargaining table.⁴⁸ Upon remand, the Authority adopted this decision, holding that an obligation to bargain exists as to midterm proposals initiated by the union unless the matter is covered by the parties' agreement or the union has clearly and unmistakably waived its right to bargain over such matters through an express provision in the agreement or when the bargaining history establishes a proposal was submitted and rejected.⁴⁹ The Authority has found that an agreement which contains

⁴⁶. Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employees, Local R7-23, 5 F.L.R.A. 9 (1981).

⁴⁷. Internal Revenue Service and National Treasury Employees Union, 17 F.L.R.A. 731 (1985).

⁴⁸. National Treasury Employees Union v. Federal Labor Relations Authority, 810 F.2d 295 (D.C. Cir. 1987).

⁴⁹. Internal Revenue Service and National Treasury Employees Union, 29 F.L.R.A. 162 (1987), enforced, Federal Labor Relations Authority v. Internal Revenue Service (District Office Unit), Department of the Treasury, 838 F.2d 567 (D.C. Cir. 1988).

a reopeners provision permitting negotiations at the midterm point of the agreement does not constitute a waiver of the union's right to submit proposals at other times during the life of the agreement.⁵⁰

The duty to bargain requires management to negotiate prior to making changes in established conditions of employment during the life of an agreement.⁵¹ The obligation exists whenever management changes an established policy or past practice relating to conditions of employment of unit employees, whether or not contained in a collective bargaining agreement, if the decision to make the change in the conditions is itself negotiable because it does not involve a reserved management right.⁵² Conditions of employment may be established by past practices which have been consistently exercised for a substantial period of time with the knowledge and consent of agency management. These practices may not be changed without giving the union an opportunity to bargain over the proposed change.⁵³ The extent of the impact of the change on employees is irrelevant in

50. United States Army Corp of Engineers, Kansas City District, Kansas City, Missouri and National Federation of Federal Employees, Local 29, 31 F.L.R.A. 1231 (1988).

51. Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employees, Local R7-23, 5 F.L.R.A. 9 (1981).

52. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire and International Federation of Professional and Technical Engineers, Local 4, AFL-CIO, 5 F.L.R.A. 352 (1981); United States Army Reserve Components Personnel and Administration Center, St. Louis, Missouri and American Federation of Government Employees, Local 900, AFL-CIO, 19 F.L.R.A. 290 (1985).

53. Department of the Treasury, Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, 27 F.L.R.A. 322 (1987).

determining whether a bargaining obligation exists in these circumstances.⁵⁴

However, if the change in the condition of employment results from the exercise of a management right which is not itself negotiable, bargaining over impact and implementation (procedures and appropriate arrangements for adversely affected employees) is only required where the impact or reasonably foreseeable impact on unit employees is more than de minimis.⁵⁵ The Authority applies a test of equity which considers all the pertinent facts and circumstances of a case, placing principal emphasis on the nature and extent of the effect or reasonably foreseeable effect on unit employees.⁵⁶ Reassignment of a single employee to a position previously held was found insufficient to trigger an obligation to bargain.⁵⁷ Reassignment of twelve employees to smaller offices was held

54. Marine Corps Logistics Base, Barstow, California and American Federation of Government Employees, AFL-CIO, Local 1482, 33 F.L.R.A. 196 (1988) (supervisor requiring single employee to exhaust annual leave for maternity absence before granting advance sick leave in violation of past practice); Department of Health and Human Services and Social Security Administration and American Federation of Government Employees, Local 1923, AFL-CIO, 30 F.L.R.A. 922 (1988) (changing practice of hand-delivery of employee's wage and tax statements to mail delivery).

55. United States Government Printing Office and Joint Council of Unions, GPO, 13 F.L.R.A. 203 (1983); Department of Health and Human Services, Social Security Administration, Chicago Region and American Federation of Government Employees, AFL-CIO, 15 F.L.R.A. 922 (1984).

56. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, Local 1760, 24 F.L.R.A. 403, 407-408 (1986).

57. Id., at 409.

sufficient to trigger a bargaining obligation.⁵⁸ Adoption of a standard which requires more than a de minimis impact before requiring impact and implementation bargaining is consistent with the competing goals of promoting governmental efficiency while at the same time permitting employees to participate meaningfully in collective bargaining. As the Authority recently recognized the right of unions to initiate proposals during the life of an agreement⁵⁹ it remains to be seen whether or not the Authority will require bargaining on proposals which do not have more than a de minimis impact. It would frustrate the underlying purpose of the Act of promoting governmental efficiency while contributing little if anything to employee interests to require bargaining over trivial issues proposed by unions.

VI. CONDITIONS OF EMPLOYMENT

The duty to bargain only extends to conditions of employment as defined in the Act.⁶⁰ Specifically excluded from conditions of employment are policies, practices, and matters relating to prohibited political activities, classification of positions, and matters to the extent they are specifically provided for by federal

⁵⁸. Environmental Protection Agency, Environmental Protection Agency Region II and American Federation of Government Employees, AFL-CIO, 25 F.L.R.A. 787 (1987).

⁵⁹. Internal Revenue Service and National Treasury Employees Union, 29 F.L.R.A. 162 (1987).

⁶⁰. 5 U.S.C. Sec. 7103(a)(14) (1982).

statute.⁶¹ Additionally, bargaining is precluded on matters which are the subject of a government-wide rule or regulation, or which are covered by agency or a primary national subdivision for which a compelling need exists as determined by the Authority.⁶² The reserved management rights contained in 5 U.S.C. Sec. 7106 are also prohibited subjects of bargaining.⁶³ Provisions entered into as to these prohibited areas are void ab initio and thus are unenforceable.⁶⁴

Few cases have been reported as to prohibited political activities found under subchapter III of chapter 73 of Title 5 U.S.C. The prohibited activities include an employee using their official influence or authority to coerce the political action of a person or body,⁶⁵ solicitation of another employee of money or a thing of value for political purposes,⁶⁶ using one's official authority or influence for purpose of affecting an election,⁶⁷ or an Executive agency employee taking an active part in political campaigns.⁶⁸

61. Id.

62. 5 U.S.C. Secs. 7117(a)(1),(2) (1982).

63. Professional Air Traffic Controllers Organization and Federal Aviation Administration, 5 F.L.R.A. 763 (1981).

64. Id.

65. 5 U.S.C. Sec. 7322 (1982).

66. 5 U.S.C. Sec. 7323 (1982).

67. 5 U.S.C. Sec. 7324(a)(1) (1982).

68. 5 U.S.C. Sec. 7324(a)(2) (1982).

Proposals which would prevent management from assigning work to an employee outside of their position classification or job description have been found nonnegotiable.⁶⁹ However, provisions which require management to attempt to assign duties consistent with an employee's position classification to the maximum extent possible have been found negotiable.⁷⁰

Matters specifically provided for by statute include pay,⁷¹ vacations,⁷² retirement,⁷³ holidays and numbers of hours of work,⁷⁴ life insurance,⁷⁵ health benefits,⁷⁶ worker's compensation,⁷⁷

69. National Association of Government Inspectors and Quality Assurance Personnel, Unit #2 and Lakehurst Naval Air Engineering Center, 8 F.L.R.A. 144 (1982); National Treasury Employees Union and Internal Revenue Service, 13 F.L.R.A. 48 (1983); National Federation of Federal Employees, Local 1622 and Department of the Army, Headquarters, Vint Hill Farms Station, Warrenton, Virginia, 16 F.L.R.A. 578 (1984).

70. American Federation of Government Employees, AFL-CIO, Local 1858 and Department of the Army, United States Army Missile Command, Redstone Arsenal, Alabama, 10 F.L.R.A. 440 (1982); Laborer's International Union of North America, AFL-CIO-CLC, Local 1267 and Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 F.L.R.A. 686 (1984).

71. 5 U.S.C. Sec 5301 et seq. (1982 & Supp V 1987); See discussion in Section X infra concerning negotiability of pay in situations where not expressly determined by statute.

72. 5 U.S.C. Sec 6301 et seq. (1982 & Supp V 1987).

73. 5 U.S.C. Sec. 8301 et seq. (1982 & Supp V 1987).

74. 5 U.S.C. Sec. 6101 et seq. (1982 & Supp V 1987).

75. 5 U.S.C. Sec. 8701 et seq. (1982 & Supp V 1987).

76. 5 U.S.C. Sec. 8901 et seq. (1982 & Supp V 1987).

77. 5 U.S.C. Sec. 8101 et seq. (1982 & Supp V 1987).

and sick leave.⁷⁸

The Authority has narrowly construed the exception for matters specifically provided for by federal statute.⁷⁹ The Authority has found the issue negotiable whenever the agency has discretion in implementing the statutory directive.⁸⁰ The Authority has used this rationale to find proposals relating to pay,⁸¹ frequency of performance appraisals,⁸² and amount of tip offset⁸³ negotiable even though the matters are generally covered by statute. The Court of Appeals for the District of Columbia Circuit reversed the Authority and held that Congress specifically granted the Veterans Administration's Administrator exclusive discretion to establish conditions of employment for Department of Medicine and Surgery employees and therefore there was no obligation for the VA to

⁷⁸. 5 U.S.C. Sec. 6301 et seq. (1982 & Supp V 1987).

⁷⁹. See Sherwood, Collective Bargaining in the Federal Sector, 25 Air Force L. Rev. 302, 305-306 (1985).

⁸⁰. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 F.L.R.A. 748, 759-760 (1980), aff'd sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 552 (D.C. Cir. 1982).

⁸¹. American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida, 24 F.L.R.A. 377 (1986).

⁸². American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 F.L.R.A. 70 (1981), enf'd sub nom. American Federation of Government Employees, AFL-CIO, Local 1968 v. Federal Labor Relations Authority, 691 F.2d 565 (D.C. Cir. 1982), cert. denied 103 S. Ct. 2085 (1983).

⁸³. American Federation of Government Employees, AFL-CIO, Local 987 and Headquarters Warner Robbins Air Logistics Command, Robins Air Force Base, Georgia, 8 F.L.R.A. 667 (1982).

negotiate with representatives of these employees even though the terms of conditions for these employees were not specifically set by federal statute.⁸⁴

The Authority adopted a two-prong test for determining whether a proposal relates to a condition of employment consisting of: 1) whether the matter proposed pertains to bargaining unit employees and 2) the nature and extent of the effect of the proposed matter upon the conditions of the bargaining unit employees.⁸⁵

An area which has been subject of numerous Authority and court opinions involves proposals which attempt to define the competitive area for Reductions-In-Force (RIFs) as including both bargaining and nonbargaining unit employees. The Authority initially held that proposals of this nature were nonnegotiable as they were beyond the duty to bargain as they directly affected the conditions of employment of non-bargaining unit employees.⁸⁶ However, the Authority found that proposals which would limit the competitive area

⁸⁴. Colorado Nurses Association v. Federal Labor Relations Authority, 851 F.2d 1486 (D.C. Cir. 1988), rev'g Colorado Nurses Association and VA Medical Center, Ft. Lyons, Colorado, 25 F.L.R.A. 803 (1987); National Union of Hospital and Health Care Employees, AFL-CIO, District 1199 and Veterans Administration Medical Center, Dayton, Ohio, 33 F.L.R.A. 281 (1988) (the Authority adopted the holding that these matters are not negotiable).

⁸⁵. Antilles Consolidated Education Association and Antilles Consolidated School System, 22 F.L.R.A. 235 (1986).

⁸⁶. Service Employees' Int'l Union, AFL-CIO, Local 566 and Department of the Army, Office of the Adjutant General, Hale Koa Hotel, Honolulu, Hawaii, 9 FLRA 687 (1982); American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 14 F.L.R.A. 754 (1984); National Federation of Federal Employees, Local 29 and Department of the Army, U.S. Army Corps of Engineers, Kansas City, Missouri, 16 F.L.R.A. 75, 77 (1984).

to the bargaining unit when a RIF occurred in the bargaining unit to be negotiable as the proposal directly affected the conditions of employment of bargaining unit employees although the proposal also affected non-bargaining unit employees by denying them consideration for positions within the bargaining unit.⁸⁷ The Court of Appeals for the District of Columbia Circuit remanded these cases to the Authority for resolution of these apparently inconsistent rulings.⁸⁸ On remand the Authority stated it would focus upon whether the impact of the proposal is so intrinsically related to the working conditions of nonunit employees as to have a significant impact on their rights. If so, the proposal would be nonnegotiable.⁸⁹ The Authority further reasoned that if the proposal would only have a limited or indirect effect on nonbargaining unit employees it would be found negotiable.⁹⁰ The Court of Appeals for the District of Columbia Circuit rejected the standard established by the Authority and instructed the Authority to carefully consider adopting the private sector test of requiring bargaining if the proposal "vitally affects" working conditions of bargaining unit employees regardless of its

⁸⁷. Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 F.L.R.A. 38 (1984).

⁸⁸. Local 32, American Federation of Government Employees, AFL-CIO v Federal Labor Relations Authority, 774 F.2d 498 (D.C. Cir. 1985).

⁸⁹. American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49 (1986).

⁹⁰. Id.

potential effect on nonbargaining unit employees.⁸¹ The court found that no management right existed to prevent bargaining merely because the proposal might affect nonbargaining unit employees.⁸² The Authority acquiesced and adopted the private sector standard for determining negotiability issues for proposals and will focus solely upon whether the matter "vitally affects" the terms and conditions of unit employees in determining whether the issue is a condition of employment. Consequently, proposals which define the competitive area for RIF purposes as including both unit and nonunit employees are negotiable conditions of employment.⁸³

The Authority has ruled that no duty to bargain exists as to the timing of the designation of a National Guard unit as a combat unit,⁸⁴ filling of supervisory positions,⁸⁵ requiring supervisors to undergo training before they could discipline employees,⁸⁶ granting

⁸¹. American Federation of Government Employees, Local 32, AFL-CIO v. Federal Labor Relations Authority, 853 F.2d 986, 991-993 (1988). citing Ford Motor Co. v. NLRB, 441 U.S. 488, 502, 99 S. Ct. 383, 397, 30 L.Ed.2d 341 (1979); Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179, 92 S.Ct. 383, 397, 30 L.Ed.2d 341 (1971); and Fibreboard Paper Products Co. v. NLRB, 379 U.S. 203, 210, 85 S.Ct. 398, 402, 13 L.Ed.2d 233 (1964).

⁸². AFGE, Local 32 v. FLRA, 853 F.2d at 991-993.

⁸³. American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 33 F.L.R.A. 335 (1988).

⁸⁴. National Federation of Federal Employees, Local 1724 and Utah National Guard, Salt Lake City, Utah, 7 F.L.R.A. 732 (1982)

⁸⁵. National Council of Field Labor Locals, AFGE, AFL-CIO v. US Dept of Labor, Washington, D.C., 3 FLRA 290 (1980).

⁸⁶. American Federation of Government Employees, National Council of EEOC Locals, No. 216, AFL-CIO and Equal Employment Opportunity Commission, Washington, D.C., 3 FLRA 503 (1980).

employees the use of recreational facilities,⁸⁷ travel or education benefits for retired employees,⁸⁸ restricting management officials access to reports,⁸⁹ and permitting off duty employees to drink alcoholic beverages in membership associations,¹⁰⁰ as the proposals did not involve matters affecting the conditions of employment of employees in the bargaining unit.¹⁰¹

Bargaining is generally prohibited over matters which are subject to government-wide regulations. Regulations which are generally applicable throughout the federal government are considered government-wide regulations even if they do not actually apply to every federal employee.¹⁰²

⁸⁷. VA Medical Center, New York, 22 F.L.R.A. No. 81 (1986); International Association of Firefighters, AFL-CIO, Local F-116 and Dept of the Air Force, Vandenburg AFB, California, 7 F.L.R.A. 245 (1981); American Federation of Government Employees, Local 225 and United States Army Armament Research and Development Command, Dover, New Jersey, 11 F.L.R.A. 630 (1983).

⁸⁸. Overseas Education Association Inc. and Department of Defense, Office of Dependent Schools, 27 F.L.R.A. 492 (1987), enf'd Overseas Education Association Inc. v. Federal Labor Relations Authority, 858 F.2d 769 (D.C. Cir. 1988).

⁸⁹. American Federation of Government Employees, AFL CIO, and National Immigration and Naturalization Service Council and United States Department of Justice Immigration and Naturalization Service, 8 F.L.R.A. 347 (1982) (internal investigative reports); American Federation of Government Employees, AFL-CIO, Local 2302 and United States Army Armor Center and Fort Knox, Fort Knox, Kentucky, 19 F.L.R.A. 778 (1985) (accident reports).

¹⁰⁰. National Federation of Government Employees, Local 1363 and United States Army Garrison, Yongsan, Korea, 12 F.L.R.A. 665 (1985).

¹⁰¹. 5 U.S.C. Sec. 7103(a)(14) (1982).

¹⁰². Overseas Education Association, Inc. and Department of Defense Office of Dependent Schools, 22 F.L.R.A. 351 (1986) (a Department of State Standardized Regulation which governs overseas allowances for federal employees was found to be a government-wide

An exception exists to the general rule that a government-wide regulation prohibit negotiation where the subject regulation merely restates generally the management prerogatives contained in the Act as the Authority has determined that a regulation does not act as any greater bar to negotiability than the underlying statutory prerogatives themselves.¹⁰³ Therefore, negotiation over appropriate arrangements for employees adversely affected by exercise of a management right is required in this limited circumstance.¹⁰⁴ It remains to be seen how expansive this exception will be. The Court of Appeals for the District of Columbia Circuit has adopted a "practical effects" test which asks whether the regulation provides management with powers it did not already have by virtue of the management's rights clause. An open question remains as to whether regulations that direct management to exercise its rights in a specific manner will prevent "adverse affects" bargaining.¹⁰⁵

Regulations of an agency or the primary national subdivision of such an agency are a bar to negotiations if a compelling need exists for the regulation.¹⁰⁶ The Authority has exercised its

regulation even though the vast majority of employees covered by the regulation were DoD employees), Aff'd Overseas Education Association, Inc. v. Federal Labor Relations Authority, 827 F.2d 814 (D.C. Cir. 1987).

¹⁰³. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 29 F.L.R.A. 380, 399-401 (1987), aff'd Office of Personnel Management v. Federal Labor Relations Authority, 864 F.2d 165 (D.C. Cir. 1988).

¹⁰⁴. OPM v. FLRA, 864 F.2d 165.

¹⁰⁵. Id., at 172.

¹⁰⁶. 5 U.S.C. Sec. 7117(a)(2) (1982).

responsibility and issued guidelines for determining whether a compelling need exists.¹⁰⁷ The Authority requires that the regulation be essential as opposed to helpful or desirable to the accomplishment of the mission of the agency in a manner consistent with the requirements of an effective or efficient government, that it is necessary to insure maintenance of basic merit principles, or that it implements a mandate to the agency under law or outside authority which implementation is essentially nondiscretionary.¹⁰⁸ The burden is upon the agency to establish that a compelling need exists for the regulation.¹⁰⁹ The Authority has rarely found that a compelling need exists for an agency regulation.¹¹⁰ An agency is only required to bargain on a subject covered by an agency regulation after the Authority determines no compelling need exists for the

107. 5 C.F.R. Sec. 2424.11.

108. Id.

109. American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 F.L.R.A. 450 (1980).

110. Sherwood, Collective Bargaining in the Federal Sector, 25 Air Force L. Rev. 302, 310-312 (1985); National Treasury Employees Union, Chapter 250 and Department of Health and Human Services Region VII, Kansas City, Missouri, 33 F.L.R.A. 555 (1988) (no compelling need existed for agency regulation banning smoking in the workplace even though the agency was responsible for educating the public as to the dangers of smoking); National Federation of Federal Employees, Local 1363 and Headquarters, United States Army Garrison, Yongsan, Korea, 4 F.L.R.A. 145 (1980) (no compelling need found for a regulation limiting purchase of food items despite agency's claim it was necessary to meet its treaty obligations which specifically sanction the armed forces to establish regulations governing purchases).

regulation.¹¹¹

VII. STANDARDS FOR DETERMINING NEGOTIABILITY

A. ACTING AT ALL AND DIRECT INTERFERENCE

Shortly after enactment of the Act the Authority was presented with the issue of what is the proper standard to apply to determine whether a proposal is negotiable. In American Federation of Government Employees, AFL-CIO, Local 1099 v. Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, N.J., the Authority was asked to determine the negotiability of a proposal that provided an employee pending disciplinary suspension or removal would remain in pay status until a final determination was made on any grievance filed by the employee.¹¹² The issue was whether this proposal impermissibly interfered with management's reserved right to discipline its employees or whether it was subject to negotiation as a procedure for the exercise of the reserved management right. The agency took the position that the proposal was nonnegotiable as it would unreasonably delay the exercise of its reserved right. The Authority relied upon the legislative history of the Act in holding that procedures are negotiable as long as they do not prevent the agency from "acting at all" and thus found the proposal negotiable as it merely determined when the agency could take the desired action

¹¹¹. Federal Labor Relations Authority v. Aberdeen Proving Grounds, Department of the Army, 485 U.S. , 108 S.Ct. 1261, 99 L.Ed.2d 470 (1988).

¹¹². 2 FLRA 153 (1979).

and not whether it could take the action.¹¹³ Particular emphasis was placed upon the following statement of the Joint Explanatory Statement of the Committee on Conference

3. Senate section 7218(b) provides that negotiations on procedures governing the exercise of authority reserved to management shall not unreasonably delay the exercise by management of its authority to act on such matters. Any negotiations on procedures governing matters otherwise reserved to agency discretion by subsection (a) may not have the effect of actually negating the authority as reserved to the agency by subsection (a). There are no comparable House provisions.

The conference report deletes these provisions. However, the conferees wish to emphasize that negotiations on such procedures should not be conducted in a way that prevents the agency from acting at all, or in a way that prevents the exclusive representative from negotiating fully on procedures....¹¹⁴

Shortly thereafter, the Authority in American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, found negotiable a proposal which required the agency to make an assignment to qualified employees upon the basis of seniority if the agency did not use competitive selection to fill the position.¹¹⁵ The Authority further found that proposals which required details, loans and temporary assignments be made solely on the basis of seniority to be nonnegotiable as the proposed procedures "directly interfered" with management's right to assign employees which includes the right to

¹¹³. Id., at 163-164.

¹¹⁴. Id., at 155 quoting Senate Report No. 85-1272, 95th Cong., 2d Sess. 158 (1978).

¹¹⁵. 2 F.L.R.A. 604, 612-614 (1980).

determine which employee will be assigned.¹¹⁶ The Authority distinguished the prior proposal as the agency retained discretion to use the competitive selection process to fill the position thereby preserving its right to select from any appropriate source.¹¹⁷

The Court of Appeals for the District of Columbia Circuit in Department of Defense v. FLRA affirmed the Authority's decisions in these two cases as an appropriate accommodation between reserved management rights [5 U.S.C. Sec. 7106(a)] and the obligation to bargain over procedures [5 U.S.C. Sec. 7106(b)], recognizing that it is the responsibility of the Authority to provide guidance and leadership by developing workable standards for determining negotiability issues.¹¹⁸ The court specifically approved use of the "direct interference" test for proposals which "stand close to the uncertain border between procedure and substance".¹¹⁹ Proposals which are purely procedural in nature and do not establish criteria by which decisions will be made are negotiable unless the effect would be to prevent management from "acting at all."¹²⁰ In approving the tests developed by the Authority, the court recognized the difficulty frequently encountered in attempting to distinguish

¹¹⁶. Id.

¹¹⁷. Id.

¹¹⁸. 659 F.2d 1140, 1150-1159 (1981), cert. denied, 461 U.S. 926, 103 S.Ct. 2085, 77 L.Ed.2d 297 (1983).

¹¹⁹. Id., at 1159.

¹²⁰. Id., at 1152-1153.

between substance and procedure.¹²¹ The use of these tests have been approved by several other courts of appeal.¹²²

Although not establishing new standards for determining negotiability, the Court of Appeals for the District of Columbia Circuit has not shown any hesitancy to reverse the Authority's negotiability determinations for improper application of the general tests despite the high degree of deference that the court is required to extend to Authority decisions. The court has criticized the Authority for applying its negotiability tests in a "theoretical vacuum" and not considering the practical consequences of a proposal.¹²³ The court reversed an Authority holding finding negotiable a proposal requiring the Customs Service to forego implementing a new means of performing inspections for a six month period while the union could study the impact of the change. Rejecting the Authority's determination that the "acting at all" standard should be applied as the proposal only addresses when the

121. Id., at 1151-1153.

122. Veterans Administration Medical Center, Tampa, Florida v. Federal Labor Relations Authority, 675 F.2d 260 (11th Cir. 1982); Department of the Air Force, United States Air Force Academy v. Federal Labor Relations Authority, 717 F.2d 1314 (1983).

123. Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority, 857 F.2d 819 (D.C. Cir. 1988) (reversing the Authority's finding of negotiability and rejecting its use of the "acting at all" standard on a proposal which would limit initial consideration for vacancies to within the bargaining unit and require the agency to wait ten days before considering nonunit individuals for the position, as the practical consequences of such a proposal would be to have the agency make its initial employment decisions from within the unit and thus "directly interferes" with management's right to consider other appropriate sources).

program could be implemented, the court determined that a decision when to implement is "part and parcel" of the substantive management right and is reserved to agency management and not subject to collective bargaining.¹²⁴

Unfortunately, application of the "acting at all" and "direct interference" tests has failed to provide meaningful guidance to the parties engaged in federal sector collective bargaining as the Authority has failed to apply the standards in a steady, consistent manner which provides the parties with a reasonable means of determining whether or not a specific proposal is negotiable. As a consequence, decisions of the Authority are routinely appealed to the courts of appeals for resolution. Then Circuit Judge Scalia identified¹²⁵ several issues on which the Authority has reached apparently inconsistent results including requirements for advance notice of training or work assignments¹²⁶ and proposals delaying imposition of discipline while an employee is undergoing

¹²⁴. United States Customs Service, Washington, D.C. v. Federal Labor Relations Authority, 854 F.2d 1414, 1417-1419 (D.C. Cir. 1988), rev'g United States Custom Service, 25 F.L.R.A. 248 (1987).

¹²⁵. National Federation of Federal Employees v. Federal Labor Relations Authority, 801 F.2d 477, 481-482 (D.C. Cir. 1986).

¹²⁶. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 15 F.L.R.A. 825, 827 (1984) (finding negotiable a proposal that would require ten days advance notice of change in work assignments); American Federation of Government Employees, AFL-CIO, Local 1749 and Department of the Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Texas, 12 F.L.R.A. 149, 150 (1983) (finding nonnegotiable a proposal which would require thirty days advance notice of firefighter training as it would prevent the agency from acting at all).

rehabilitation.¹²⁷ Because of the inability of the Authority to apply its own tests in a consistent manner several members of the Court of Appeals for the District of Columbia Circuit have expressed dissatisfaction with the Authority's application of the standards it uses for determining negotiability issues.¹²⁸ Despite this dissatisfaction by several members of the court they have not decided to hear the issue en banc to determine whether or not to overturn their acceptance of the "acting at all" and "direct interference"

¹²⁷. American Federation of Government Employees, Local 1812, AFL-CIO and United States Information Agency, 16 F.L.R.A. 308, 310-311 (1984) (finding nonnegotiable a proposal that discipline be stayed while an employee is enrolled in rehabilitation and is making progress); National Treasury Employees Union and Internal Revenue Service, 6 F.L.R.A. 522, 523-524 (1981) (finding nonnegotiable a proposal barring discipline as long as an employee is a participant in a rehabilitation program); and American Federation of State, County, and Municipal Employees, AFL-CIO, Local 2910 and Library of Congress, 11 F.L.R.A. 632, 635 (1983) (finding negotiable a proposal that would stay discipline against an employee in rehabilitation to permit the employee a reasonable opportunity to improve their performance).

¹²⁸. Then Circuit Judge Scalia writing for the court in National Federation of Federal Employees, Local 615 v. Federal Labor Relations Authority, 801 F.2d 477, 483 (D.C. Cir. 1986) ("We doubt, however, whether the court will be able to live indefinitely with a test that conceals rather than explains the FLRA's policy judgments which ultimately determine whether substantive management rights have realistically been impaired."); Circuit Judge Williams concurring and dissenting in Defense Logistics Council v. Federal Labor Relations Authority, 810 F.2d 234, 241-242 (D.C. Cir. 1987); Circuit Judge D.H. Ginsburg writing for the court in United States Custom Service, Washington, D.C. v. Federal Labor Relations Authority, 854 F.2d 1414, 1420 (D.C. Cir. 1988) ("Whatever merit the standard may have when it is applied properly... the FLRA's use of it seems at times to be mechanical, displacing any reasoned consideration of the proposal before it, and yielding results that are not only patently inconsistent... but also, as in this case, utterly irrational.").

¹²⁸ tests. However, if the Authority does not consistently apply these tests it would be in the interests of federal labor-management relations for the court to revisit the area and provide the Authority with a more workable standard for determining negotiability issues.

B. EXCESSIVE INTERFERENCE TEST

Appropriate arrangements must be negotiated for employees adversely affected by management's exercise of its rights.¹²⁹ The union must demonstrate that the exercise of a management right has adversely affected employees before "appropriate arrangements" bargaining is necessary.¹³⁰ Appropriate arrangements are found to

¹²⁸. Then Circuit Judge Scalia writing for the court in National Federation of Federal Employees, Local 615 v. Federal Labor Relations Authority, 801 F.2d 477, 483 (D.C. Cir 1986) ("We doubt, however, whether the court will be able to live indefinitely with a test that conceals rather than explains the FLRA's policy judgments which ultimately determine whether substantive management rights have realistically been impaired"); Judge Williams concurring and dissenting in Defense Logistics Council v. Federal Labor Relations Authority, 810 F.2d 234, 241-242 (D.C. Cir. 1987); Judge D.H. Ginsburg writing for the court in United States Custom Service, Washington D.C. v. Federal Labor Relations Authority, 854 F.2d 1414, 1420 (D.C. Cir. 1988) ("Whatever merit the standard may have when it is applied properly... the FLRA's use of it seems at times to be mechanical, displacing any reasoned consideration of the proposal before it, and yielding results that are not only patently inconsistent... but also, as in this case, utterly irrational.").

¹²⁹. 5 U.S.C. Sec. 7106(b)(3) (1982).

¹³⁰. American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, 32 F.L.R.A. 1023 (1988) (proposal that employees be provided training to enhance their potential for advancement did not involve an adverse affect); Federal Employees Metal Trades

be negotiable if they do not "excessively interfere" with the exercise of management's rights.¹³¹ In determining whether a proposal "excessively interferes" the Authority examines the totality of the facts and circumstances including the following factors: 1) the nature and extent of the impact upon the adversely affected employees, 2) extent to which the circumstances of the adverse effects are within the employee's control, 3) the impact upon management's ability to deliberate and act with respect to its statutory rights, 4) is the negative impact upon management's rights disproportionate to the benefits to the employees from the proposal, and 5) the effect the proposal will have upon the effective and efficient exercise of government operations.¹³² Proposals found to "excessively interfere" include a requirement that disciplinary action against employees be supported by signed written statements,¹³³ requiring RIF'd employees to fill positions without providing management

Council of Charleston and Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 29 F.L.R.A. 1422 (1987)
(proposal that vacancies be filled by particular employees was found not to involve employees adversely affected); American Federation of Government Employees, AFL-CIO Local 738 and Department of the Army, Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas, 33 F.L.R.A. 380 (1988).

¹³¹. American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983).

¹³². National Association of Government Employees, Local R14-87 and Kansas City National Guard, 21 F.L.R.A. 24, 31-33 (1986).

¹³³. American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, 32 F.L.R.A. 1021 (1988).

discretion on whether or not to fill the positions,¹³⁴ and prohibiting a supervisor from recommending discharge of an employee for unacceptable performance unless the supervisor determines the employee cannot successfully perform any other job in the agency.¹³⁵ Proposals found negotiable because they do not "excessively interfere" include requiring training to be determined by management for employees in a RIF,¹³⁶ granting RIF'd employees bump and retreat rights,¹³⁷ and requiring a non-binding cost-benefit analysis be conducted before a RIF is implemented.¹³⁸

VIII. SPECIFIC RESERVED MANAGEMENT RIGHTS

Management retains the right to engage in managerial

¹³⁴. American Federation of Government Employees, Local 2761 and Department of the Army, Army Publications Distribution Center, St. Louis, Missouri, 32 F.L.R.A. 550 (1988); Bremerton Metal Trades Council and Naval Supply Center Puget Sound, 32 F.L.R.A. 643 (1988) (Provision 6).

¹³⁵. American Federation of Government Employees, Local 1923 and Department of Health and Human Services, 21 F.L.R.A. 178 (1986) (Proposal 6); Enf'd American Federation of Government Employees, AFL-CIO, Local 1923 v. Federal Labor Relations Authority, 819 F.2d 306 (D.C. Cir. 1987).

¹³⁶. International Plate Printers, Die Stampers and Engravers Union of North America, AFL-CIO, Local 2 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 25 F.L.R.A. 113, 140 (1987); American Federation of Government Employees, AFL-CIO, Local 1625 and Non-Appropriated Fund Instrumentality, Naval Air Station, Oceana, Virginia, 31 F.L.R.A. 1281 (1988) (Proposal 1).

¹³⁷. Merit Systems Protection Board, Professional Association and Merit Systems Protection Board, 31 F.L.R.A. 258 (1988).

¹³⁸. American Federation of Government Employees, AFL-CIO and Department of Housing and Urban Development, 21 F.L.R.A. 354 (1986).

deliberations and discussion without union participation when determining how to exercise its specified management rights.¹³⁹ Proposals which require a joint labor-management committee to develop performance standards,¹⁴⁰ union member be appointed to a review board which recommends to management whether to grant appraisal appeals,¹⁴¹ and union membership on a promotion panel¹⁴² have all been found to be nonnegotiable as directly interfering with management's rights.

Agency management retains the right to determine its budget.¹⁴³ The Authority has very narrowly interpreted this management right. In order for an agency to successfully refuse to negotiate on a proposal because it infringes upon its right to determine its budget the Authority requires the agency to establish that the proposal prescribes a specific program or amount to be included in an agency's budget or make a substantial showing that a significant increase in costs will occur which will not be offset by

¹³⁹. National Federation of Federal Employees, Local 1167 and Department of the Air Force, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 F.L.R.A. 574 (1981) enf'd sub nom. National Federation of Employees v. Federal Labor Relations Authority, 681 F.2d 886 (D.C. Cir. 1982).

¹⁴⁰. American Federation of Government Employees, AFL-CIO, Local 1708 and Military Ocean Terminal, Sunny Point, Southport, North Carolina, 15 F.L.R.A. 3 (1984).

¹⁴¹. Association of Civilian Technicians, Columbine Council and The Adjutant General, Colorado, 28 F.L.R.A. 969 (1987).

¹⁴². National Federation of Federal Employees, Local 1745 & Veterans Administration, 13 F.L.R.A. 543 (1983) aff'd National Federation of Federal Employees, Local 1745 v. Federal Labor Relations Authority, 828 F.2d 834 (D.C. Cir. 1987).

¹⁴³. 5 U.S.C. Sec. 7106(a)(1) (1982).

compensating benefits such as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances and the like.¹⁴⁴ The Authority reasonably rejected the agency's contention that a matter is nonnegotiable if it would result in any increase in costs as this would effectively preclude bargaining well beyond what Congress intended.¹⁴⁵

However, for all practical purposes the Authority has written the provision out of the Act as there are few union proposals which require a separate line item in an agency's budget and the Authority almost never finds that the Agency has supported its claim that substantial cost increases will result which will not be offset by compensating benefits. The Authority held that an agency failed to show that a proposal which would require the agency to increase the percentage of the health insurance premium it paid for a group of employees from forty-six percent to seventy-five percent violated its right to determine its budget because the agency retained control over a number of factors which could affect the ultimate cost and it had not presented substantial proof that the increased costs would not be offset by other benefits.¹⁴⁶ A proposal which would require wage increases to be tied to the cost-of-living/comparability factor was found negotiable as the agency did not sufficiently demonstrate

¹⁴⁴. AFGE and AFLC, 2 F.L.R.A. 604, 607-609 (1980).

¹⁴⁵. Id.

¹⁴⁶. American Federation Of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida, 24 F.L.R.A. 377 (1986).

that any increase in costs would not be outweighed by compensating benefits.¹⁴⁷ The Fourth Circuit recently reversed an Authority decision finding negotiable a proposal which would require that certain bonus payments be made mandatory based upon performance ratings. The court emphasized that a negotiability analysis cannot be done in a theoretical vacuum but must consider the impact the proposal is likely to have on the agency, which in this case might require the agency to reallocate funds from one program to another thereby directly interfering with the agency's right to determine its budget.¹⁴⁸ The Authority should reevaluate the manner in which it applies its standard for determining whether a proposal impermissibly interferes with an agency's ability to determine its budget as current precedent could lead one to conclude that the provision has been written out of the Act.

The Authority has shown considerable deference to agencies when they assert that a proposal interferes with its ability to determine its organizational structure.¹⁴⁹ Proposals which require an agency to adopt a specific organizational structure¹⁵⁰ or to alter an

¹⁴⁷. National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C., 21 F.L.R.A. 282 (1986). Section X infra for a further discussion of the negotiability of pay issues.

¹⁴⁸. Department of the Air Force, Langley Air Force Base v. Federal Labor Relations Authority, No. 88-2171 (4th Cir. July 3, 1989).

¹⁴⁹. 5 U.S.C. Sec. 7106(a)(1) (1982).

¹⁵⁰. American Federation of Government Employees, AFL-CIO, Local 2375 and 79th United States Army Reserve Command, Willow Grove, Pennsylvania, 11 F.L.R.A. 243 (1983).

existing organizational structure¹⁵¹ are nonnegotiable. Proposals requiring an agency to alter its organizational structure to provide greater promotion opportunities for certain employees,¹⁵² or which limit filling of civilian positions with military personnel¹⁵³ have been found nonnegotiable as interfering with the agency's right to determine its organization.

Similarly, the Authority has permitted agencies considerable latitude in determining their internal security procedures. Internal security concerns the management plan for securing or safeguarding its physical property against internal or external risks.¹⁵⁴ The Authority will not analyze an agency's plan to determine if it is an effective method of achieving internal security.¹⁵⁵ Proposals which limit investigative techniques used by management,¹⁵⁶ prohibit the

151. National Association of Government Inspectors and Quality Assurance Personnel, Unit #2 and Naval Air Engineering Center, Lakehurst, New Jersey, 8 F.L.R.A. 144 (1982).

152. 79th Army Reserve Command, 11 F.L.R.A. 243 (1983).

153. American Federation of Government Employees, AFL-CIO, Local 3742 and Department of the Army, Headquarters, 98th Division (Training), Webster, New York, 11 F.L.R.A. 189 (1983); National Federation of Federal Employees and Arkansas Army National Guard, 11 F.L.R.A. 228 (1983).

154. National Federation of Federal Employees, Local 1363 and Headquarters, United States Army Garrison Yongsan, Korea, 4 F.L.R.A. 139 (1980).

155. National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, U.S. Army Corps of Engineers, Kansas City, Missouri, 21 F.L.R.A. 233, 235 (1986); American Federation of Government Employees, Council 214, AFL-CIO and Department of Defense, Department of the Air Force, Air Force Logistics Command, 30 F.L.R.A. 1025 (1987).

156. Redstone Arsenal, 10 F.L.R.A. 440 (1982); See Celmer, Investigations, 89 Fed. Lab. Rel. Rep. V-17 (1989).

use of polygraphs,¹⁵⁷ allow employees to leave the agency's premises during scheduled work breaks,¹⁵⁸ make wearing of a designated uniform on a voluntary basis,¹⁵⁹ and permitting union officials clearance to enter all work areas,¹⁶⁰ have all been found nonnegotiable as they interfere with the ability of management to determine internal security practices. Proposals which would require an agency to establish an employee has committed gross negligence and not merely simple negligence before imposing liability¹⁶¹ and which would limit the amount of liability for damage to a specific dollar amount¹⁶² have also been found nonnegotiable as directly interfering with management's right to determine internal security practices.

Illustrative of how far the Authority will go to find a matter nonnegotiable due to its interference with internal security is its finding nonnegotiable a proposal which would require management to

¹⁵⁷. American Federation of Government Employees, Local 32 and Office of Personnel Management, 16 F.L.R.A. 40 (1984).

¹⁵⁸. International Association of Machinists and Aerospace Workers Union and Department of the Treasury, Bureau of Engraving and Printing, 33 F.L.R.A. 711 (1988).

¹⁵⁹. American Federation of Government Employees, Council 214 and Department of the Air Force, Air Force Logistics Command, 30 F.L.R.A. 1025 (1988).

¹⁶⁰. National Treasury Employees Union and Internal Revenue Service, 7 F.L.R.A. 275 (1981).

¹⁶¹. National Association of Government Employees, Local R7-23 and Department of the Air Force, Scott Air Force Base, Illinois, 23 F.L.R.A. 753 (1986).

¹⁶². National Treasury Employees Union, Local 29 and Army Corps of Engineers, Kansas City, 21 F.L.R.A. 233 (1986), NAGE, Local R7-23 and Dept of the Air Force, Scott Air Force Base, Illinois, 23 F.L.R.A. 753 (1986).

make an effort to locate the driver of an automobile of an illegally parked car before it could be towed.¹⁶³

Proposals which require the search of an employee's locker be based upon reasonable suspicion¹⁶⁴, that an employee be present during a search of their locker¹⁶⁵, desk or filing cabinet¹⁶⁶ have been found negotiable as they do not impermissibly interfere with management's right to determine internal security practices.

Management retains the right to hire, assign, direct, layoff, or suspend, remove, reduce in grade or pay, or to take other disciplinary action against employees.¹⁶⁷ The right to direct employees encompasses the ability of management to supervise and guide the employees in the performance of their jobs¹⁶⁸ by determining the quantity, quality, and timeliness of work production

¹⁶³. American Federation of Government Employees, Local 1141 and Department of the Army, Fort Benjamin Harrison, 32 F.L.R.A. 990 (1988).

¹⁶⁴. American Federation of Government Employees, Local 1759 and Department of the Army Headquarters, Fort McPherson, Georgia, 29 F.L.R.A. 261 (1987) (the proposal adopts the standard for searches of employee areas where there is a reasonable expectation of privacy established in O'Connor v. Ortega, 480 U.S. 709. 107 S.Ct. 1492, 94 L.Ed.2d 714(987)).

¹⁶⁵. AFGE, Local 1759 and Fort McPherson, 29 F.L.R.A. at 263-265.

¹⁶⁶. National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, Albany District, New York, 7 F.L.R.A. 304 (1981).

¹⁶⁷. 5 U.S.C. Sec. 7106(a)(2) (1982).

¹⁶⁸. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 F.L.R.A. 769, 775 (1980), affirmed sub nom. NTEU v. FLRA, 691 F.2d 553 (D.C. Cir.1982).

and establishing priorities for its accomplishment.¹⁶⁹

Numerous negotiability determinations have been rendered on the right of management to assign work.¹⁷⁰ The Court of Appeals for the District of Columbia Circuit has broadly interpreted this right as permitting management

...the right to determine what work will be done, and by whom, and when it is to be done, is at the very core of successful management ...this right is essential to management's ability to achieve optimum productivity, and accordingly to the agency's ability to function in an effective manner. The Authority's construction of Section 7106(a) as a reservation of this invaluable right to management, thereby insulating it from dilution at the bargaining table, is fully obedient to the congressional command that the Act be interpreted in a manner consistent with the exigencies of efficient government.¹⁷¹

The Fifth Circuit has also adopted this expansive interpretation of the right to assign work.¹⁷²

The right to assign work gives management the right to determine the particular position to which an employee will be assigned.¹⁷³ Management retains the right to determine the requisite

¹⁶⁹. Social Security Administration, Northeastern Program Service Center and American Federation of Government Employees, Local 1760, AFL-CIO, 18 F.L.R.A. 437 (1985); Tidewater Virginia Federal Employees Metal Trades Council and Navy Public Works Center, Norfolk, Virginia, 15 F.L.R.A. 343 (1984).

¹⁷⁰. 5 U.S.C. Sec. 7106(a)(2)(B) (1982).

¹⁷¹. National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553, 563 (D.C. Cir. 1982).

¹⁷². United States Immigration and Naturalization Service v. Federal Labor Relations Authority, 834 F.2d 518 (5th Cir. 1987); United States Department of Justice, 727 F.2d 481, 487 (5th Cir. 1984).

¹⁷³. American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 F.L.R.A. 604, 613 (1980).

qualifications for a position¹⁷⁴ and to determine whether a particular individual possesses those qualifications.¹⁷⁵ Proposals which would require an agency to maintain an equitable distribution of work among its various locations,¹⁷⁶ limit duration and timing of training,¹⁷⁷ require training,¹⁷⁸ require work to be assigned to a specific individual,¹⁷⁹ limit the type of work that can be assigned to an employee,¹⁸⁰ prohibit use of a mandatory rotation policy for unit employees,¹⁸¹ require travel during duty hours,¹⁸² place

¹⁷⁴. Bureau of Engraving and Printing, Washington, D.C. and International Association of Machinists, Franklin Lodge 2135, Washington, D.C. 32 F.L.R.A. 532 (1988).

¹⁷⁵. United States Marine Corps, Marine Corps Logistics Base, Albany, Georgia and American Federation of Government Employees, Local 2317. 23 F.L.R.A. 369 (1986).

¹⁷⁶. Action Employees Local, American Federation of State County and Municipal Employees and Action, 31 F.L.R.A. 1006 (1988).

¹⁷⁷. International Association of Firefighters, Local F-61 and Philadelphia Naval Shipyard, 3 F.L.R.A. 438, 439 (1980); American Federation of Government Employees, AFL-CIO, Local 1749 and Department of the Air Force 47th Flying Wing, Laughlin Air Force Base, Texas, 12 F.L.R.A. 149, 150 (1983).

¹⁷⁸. Overseas Education Association and Department of Defense Dependents Schools, 29 F.L.R.A. 485 (1987).

¹⁷⁹. American Federation of Government Employees, AFL-CIO, Local 1331 and Department of Agriculture, Science and Education Administration, Eastern Regional Research Center, Philadelphia, Pennsylvania, 4 F.L.R.A. 8 (1980).

¹⁸⁰. American Federation of Government Employees, AFL-CIO, Local 2317 and United States Marine Corps Logistics Base, Nonappropriated Fund Instrumentality, Albany, Georgia, 29 F.L.R.A. 1587 (1987).

¹⁸¹. American Federation of Government Employees, AFL-CIO, Local 3529 and Defense Contract Audit Agency, 3 F.L.R.A. 301 (1980).

restrictions on scheduling of overtime on holidays,¹⁸³ and grant grace periods during which employees work product cannot be used to initiate adverse actions,¹⁸⁴ have all been found nonnegotiable as they directly interfere with management's right to assign work.

Generally, proposals which attempt to limit work that can be assigned to union officials have been found nonnegotiable as they interfere with management's right to assign work.¹⁸⁵ Likewise,

¹⁸². American Federation of Government Employees, AFL-CIO, Local 1770 and Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 17 F.L.R.A. 752, 757-758 (1985); Department of the Navy, Supervisor of Shipbuilding Conversion and Repair, Boston, Massachusetts and International Federation of Professional and Technical Engineers, Local 15, AFL-CIO, 33 F.L.R.A. 187 (requiring travel during duty hours when event causing travel within agency control was found nonnegotiable); Cf. American Federation of Government Employees, Local 1799, AFL-CIO and United States Army, Aberdeen Proving Ground, Maryland, 26 F.L.R.A. 926, 930-933 (1987) (requiring travel within duty hours where practicable found negotiable as this was consistent with the mandate in 5 U.S.C. Sec. 6101(b)(2)).

¹⁸³. American Federation of Government Employees, AFL-CIO, Local 1815 and Army Aviation Center, Fort Rucker, Alabama, 28 F.L.R.A. 1172 (1987).

¹⁸⁴. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO, 33 F.L.R.A. 454, 463-465 (1988); Department of Health and Human Services, Social Security Administration v. Federal Labor Relations Authority, 791 F.2d 324 (4th Cir. 1986), rev'd National Federation of Federal Employees, Council of Consolidated SSA Locals and Department of Health and Human Services, Social Security Administration, 17 F.L.R.A. 657 (1985).

¹⁸⁵. International Association of Machinists and Aerospace Workers, Local 726 and Naval Air Rework Facility, North Island, San Diego, California, 31 F.L.R.A. 158 (1988) (transfer of union officials outside their assigned representational area only with the consent of the union official); National Treasury Employees Union and Department of the Treasury, United States Custom Service, 31 F.L.R.A. (1988) (union officials selected for details or temporary promotions to supervisory positions would be able to accept or deny their assignment); But see National Treasury Employees Union and Internal Revenue Service, 28 F.L.R.A. 40 (1987) (finding negotiable a proposal

proposals which attempt to give union officials superseniority for purposes of a RIF have been found to directly interfere with management's right to remove employees.¹⁸⁶

A union proposal which would require the agency to place excess employees on paid administrative leave during the Christmas holiday season instead of furlough (status where employee has no duties and is not paid) was found negotiable by the Authority.¹⁸⁷ The First Circuit reversed finding the proposal "affected" management's right to layoff employees and thus was nonnegotiable.¹⁸⁸

The Authority has issued numerous opinions on the identification, establishment, and application of performance standards and critical elements. Management's identification of critical elements and the establishment of performance standards constitute exercises of management's rights to direct employees and assign work.¹⁸⁹ However, proposals which establish procedures or

that absent just cause union officials be permitted to perform duties in their offices prior to soliciting volunteers).

¹⁸⁶. American Federation of Government Employees, Local 2612, AFL-CIO and Department of the Air Force, Headquarters, 416th Combat Support Group (SAC), Griffiss Air Force Base, New York, 19 F.L.R.A. No. 117 (1985); Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144 and Department of the Navy, Naval Underwater Systems Center, 23 F.L.R.A. 804 (1986).

¹⁸⁷. National Association of Government Employees, Local R1-144 and Department of the Navy, Naval Underwater Systems Center, 29 F.L.R.A. 471 (1987).

¹⁸⁸. Department of the Navy Underwater Systems Center v. Federal Labor Relations Authority, 854 F.2d 1 (1988).

¹⁸⁹. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 F.L.R.A. 769 (1980), aff'd sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553 (D.C. Cir. 1982).

appropriate arrangements for adversely affected employees are negotiable.¹⁹⁰ Proposals which merely require an agency to comply generally with laws¹⁹¹ or regulation¹⁹² when developing performance standards and critical elements have been found negotiable. Proposals which incorporate specific provisions of a government-wide regulation directly interferes with management's right in this area as it imposes a substantive contractual obligation which remains even if the underlying regulation is changed or revoked during the life of the agreement.¹⁹³ Limitations on management's establishment of performance standards in excess of requirements imposed by law or regulation are nonnegotiable.¹⁹⁴

¹⁹⁰ . National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 F.L.R.A. 769, 780 (1980), aff'd sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553 (D.C. Cir. 1982)

¹⁹¹ . National Federation of Federal Employees, Local 1497 and Department of the Air Force, Lowry Air Force Base, Colorado, 9 F.L.R.A. 151 (1982).

¹⁹² . American Federation of Government Employees, Local 1923, AFL-CIO and Department of Health and Human Services, Office of the Secretary Headquarters, Office of the General Counsel, Social Security Division, 21 F.L.R.A. 178, (1986).

¹⁹³ . National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 F.L.R.A. 574 (1981), aff'd as to other matters National Federation of Federal Employees, Local 1167 and Federal Labor Relations Authority, 681 F.2d 886 (D.C. Cir. 1982).

¹⁹⁴ . American Federation of Government Employees, Local 3748 v. Federal Labor Relations Authority, 797 F.2d 612 (8th Cir. 1986), aff'd American Federation of Government Employees, Local 3748, AFL-CIO and Agricultural Research Service, Northern States Area and American Federation of Government Employees, AFL-CIO, Local 3365 and Department of the Agriculture, Forest Service, Black Hills National Forest, 20 F.L.R.A. 495 (1985); National Treasury Employees Union and United States Department of Agriculture, Food and Nutrition Service

Proposals which would create joint labor-union advisory committees to make recommendations regarding the legality of performance standards and elements have been found negotiable where management retains authority to accept or reject the recommendations.¹⁹⁵ Employee participation in the formulation of performance standards is encouraged by 5 U.S.C. Sec. 4302(a)(2) and proposals which provide the procedure for employee participation are negotiable.¹⁹⁶

Arbitrators are permitted to examine performance standards and elements established by management to insure that they comply with applicable laws and regulations and direct an agency to bring those found to violate such into compliance.¹⁹⁷

Midwest Region, 32 F.L.R.A. 62 (1988) (proposal that standards will not consider factors beyond an employees control); American Federation of Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, Army Test, Measurement, and Diagnostic Equipment Support Group, Army Information Systems Command-Redstone Arsenal Commissary, 27 F.L.R.A. 69 (1987) (requiring jobs with essentially the same duties to have the same major job elements); American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 28 F.L.R.A. 714 (1987) (requirement that performance standards and elements be fair).

195. Newark Air Force Station and American Federation of Government Employees, Local 2221, 30 F.L.R.A. 616, 636 (1988); American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 F.L.R.A. 217, 229-230 (1981); National Treasury Employees Union and Nuclear Regulatory Commission, 31 F.L.R.A. 566, 575 (1988).

196. Patent Office Professional Association and Patent and Trademark Office, Department of Commerce, 29 F.L.R.A. 116 (1987); National Federation of Federal Employees and Department of the Interior, Bureau of Land Management, 29 F.L.R.A. 1491 (1987).

197. National Federation of Federal Employees, Local 1623 and South Carolina National Guard, Columbia, South Carolina, 28 F.L.R.A. 633, 636 (1987).

Whenever the right to assign work is involved one must consider whether proposals submitted by unions are appropriate arrangements for adversely affected employees as the Authority has interpreted this entitlement to bargain broadly. Proposals found to be appropriate for bargaining as appropriate arrangements include refusals to perform assigned work when an employee has a reasonable belief the tasks pose an imminent risk of death or serious bodily harm,¹⁹⁸ and permitting work assignments to be limited when the agency's medical authorities restrict duties to which employees can be assigned for medical reasons.¹⁹⁹

Management retains the rights to fill positions and to make appointments from properly ranked and certified candidates or from any other appropriate source.²⁰⁰ Proposals which require the selection of a particular individual are nonnegotiable as they improperly encroach upon management's right to select the individual

¹⁹⁸. American Federation of Government Employees and Army and Air Force Exchange Service, 30 F.L.R.A. 909 (1988) (found the issue of great concern to employees and would only limit management's ability to assign duties in very limited circumstances); But see American Federation of Government Employees, AFL-CIO, Local 1858 and United States Army Missile Command, Army Test, Measurement, and Diagnostic Equipment Support Group, Army Information Systems Command-Redstone Arsenal Commissary, 27 F.L.R.A. 69, 77-79 (1987) (finding nonnegotiable a proposal which would allow employees to refuse assignments beyond their physical capacities).

¹⁹⁹. American Federation of Government Employees, Local 2663 and Veterans Administration Medical Center, Kansas City, Missouri, 31 F.L.R.A. No. 77 (1988), American Federation of Government Employees, Local 2024 and Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 30 F.L.R.A. 16 (1987).

²⁰⁰. 5 U.S.C. Sec. 7106(a)(2)(C) (1982).

to fill a position.²⁰¹ However, proposals which establish procedures for management to follow when filling a position are generally negotiable.²⁰² Proposals which require management to select based upon seniority among candidates the agency determines are qualified if the agency does not elect to select from another appropriate source have been found negotiable.²⁰³

Whenever a RIF is involved, appropriate arrangements for adversely affected employees can include priority consideration for vacancies filled by management for which they are qualified.²⁰⁴

²⁰¹. American Federation of Government Employees, AFL-CIO, Local 916 and Tinker Air Force Base, Oklahoma, 7 F.L.R.A. 292 (1981) (proposal which would require employee listed first on listing of qualified candidates be offered the position); National Federation of Federal Employees, Local 1332 and Headquarters, United States Army Materiel Development and Readiness Command, Alexandria, Virginia, 6 F.L.R.A. 361, 363-365 (1981) (proposal which would prohibit the agency from expanding the area of consideration if one highly qualified unit employee exists and requiring that the position be provided to this employee).

²⁰². Veterans Administration, Perry Point, 2 F.L.R.A. 427 (1980) (requiring management to exhaust minimum area of consideration before expanding search or making selections from other appropriate sources); National Treasury Employees Union and Internal Revenue Service, 7 F.L.R.A. 275 (1981) (requiring management use competitive procedures when considering nonunit employees for a position); American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 8 F.L.R.A. 460 (1982) (requiring selection within two weeks after receipt of the certificate of qualified candidates).

²⁰³. American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, 2 F.L.R.A. 604, 612-613 (1980); Laborers International Union of North America, AFL-CIO, Local 1276 and Veteran Administration, National Cemetery Office, San Francisco, California, 9 F.L.R.A. 703 (1982).

²⁰⁴. See Section VII.B supra for a general discussion of appropriate arrangements.

As part of its right to fill positions, management retains the right to determine the "knowledge, skills, and abilities" (KSAs) required of an individual to be qualified to fill a position.²⁰⁵ Proposals which attempt to subject the content of KSAs to collective bargaining are nonnegotiable.²⁰⁶ Additionally, proposals which call for union participation in the drafting of KSAs have been found nonnegotiable as they "directly interfere" with management's right to determine KSAs.²⁰⁷

A proposal which would require the certificate of eligible candidates be closed whenever five fully qualified employees were placed on it was found to be nonnegotiable as it "directly interfered" with the right of management to select from any appropriate source.²⁰⁸

205. National Federation of Federal Employees, Local 1745 and Veterans Administration, 13 F.L.R.A. 543 (1983) enf'd National Federation of Federal Employees, Local 1745 v. Federal Labor Relations Authority, 828 F.2d 834 (D.C. Cir. 1987); United States Customs Service, Region II v. Federal Labor Relations Authority, 739 F.2d 829 (4th Cir. 1984) rev'g National Treasury Employees Union and Department of the Treasury, United States Custom Service, Washington D.C., 11 F.L.R.A. 247 (1983).

206. National Treasury Employees Union and United States Department of Agriculture, Food & Nutrition Service, Midwest Region, 25 F.L.R.A. 1067 (1987), enf'd National Treasury Employees Union v. Federal Labor Relations Authority, 848 F.2d 1273 (D.C. Cir. 1988).

207. NFFE, Local 1745 and VA, 13 F.L.R.A. 543 (1983); See National Federation of Federal Employees, Local 1497 and Headquarters, Lowry Technical Training Center (ATC), Lowry Air Force Base, Colorado, 11 F.L.R.A. 565, 568 (1983) (finding that development of selection factors is part of management's right to select).

208. American Federation of Government Employees, Local 3296 and National Guard Bureau, Alaska National Guard, 33 F.L.R.A. 99 (1988) (also not found to be an "appropriate arrangement" as it was not shown how a unit employee would be affected adversely by the agency filling a vacancy in a non-RIF situation).

Proposals which require discipline to be initiated within a specific time after occurrence of the event or occurrence warranting the discipline have been found nonnegotiable as they prevent the agency from acting at all by establishing a contractual statute of limitations after which disciplinary action cannot be taken thereby preventing the agency from disciplining certain employees.²⁰⁹ Union proposals which require an agency to use a table of penalties is nonnegotiable as it directly interferes with management's right to discipline.²¹⁰ Likewise, attempts to limit the acts for which discipline can be imposed have been found to directly interfere with management's right to discipline employees.²¹¹

The right to have employees account for their conduct and work

209. National Federation of Government Employees, Local 615 and National Park Service, Sequoia and Kings Canyon National Parks, U.S. Department of Interior. 17 F.L.R.A. 318 (1985), affirmed sub nom. National Federation of Federal Employees, Local 615 v. Federal Labor Relations Authority, 801 F.2d 477 (D. C. Cir. 1986); American Federation of Government Employees, AFL-CIO, Local 2298 and Missile Facility Atlantic, Charleston, South Carolina, 25 F.L.R.A. 517 (1987). But see National Federation of Federal Employees, Local 1853 and United States Attorney's Office, Eastern District of New York, Brooklyn, N.Y., 29 F.L.R.A. 94 (1987) (finding negotiable a proposal that all adverse disciplinary actions must be initiated within a reasonable period of time); But see National Federation of Federal Employees, Local 1853 and United States Attorney Office, Eastern District of New York, Brooklyn, New York, 29 F.L.R.A. 94 (1987) (which allows requiring all be initiated within a reasonable period of time as this merely incorporated the statutory requirement).

210. New York State Nurses Association and Veterans Administration, Bronx Medical Center, 30 F.L.R.A. 706, 733-734 (1988).

211. Federal Union of Scientists and Engineers, NAGE Local R1-144 and Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 30 F.L.R.A. 494 (1987) (proposal which would only authorize punishment for possession of marijuana if it could be shown it was intended for personal use or intended sale).

performance is within management's prerogative in assigning work. Therefore, the Authority has found proposals which would permit an employee to remain silent when questioned by management are nonnegotiable as this would impermissibly interfere with this right.²¹²

Management is specifically given the right to make decisions regarding contracting out.²¹³ Office of Management and Budget (OMB) Circular No. A-76 provides criteria for federal agencies to use when making decisions regarding contracting out.²¹⁴ Federal agencies are required to conduct cost-comparisons of performing commercial activities in-house and of contracting out such activities. If the activities can be provided more cost effectively on a contract basis they are generally required to be contracted out.²¹⁵ The Authority and the courts of appeal have issued a significant number of opinions regarding proposals which attempt to limit an agency's ability to contract out by setting up standards

212. Tidewater Virginia Federal Employees Metal Trades Council and Navy Public Works Center, Norfolk, Virginia, 15 F.L.R.A. No. 73 (1984); American Federation of Government Employees, Local 1812, AFL-CIO and United States Information Agency, 16 F.L.R.A. 308 (1984); American Federation of Government Employees, AFL-CIO, Local 2052 and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Petersburg, Virginia, 30 F.L.R.A. 837, 841 (1987) (proposal which would prevent supervisors from questioning employees as to the reason for sick leave).

213. 5 U.S.C. Sec. 7106(a)(2)(B) (1982).

214. 5 U.S.C. Sec. 7106 (a)(2)(B) (1982).

215. Id.

of review for arbitrators based upon OMB Circular No. A-76.²¹⁶

The Authority has consistently found proposals which require an agency to comply generally with OMB Circular No. A-76 and other applicable laws and regulations when making decisions regarding contracting out to be negotiable.²¹⁷ The Authority has held that decisions regarding contracting out affect "conditions of employment" because a decision to contract out has the potential of resulting in the loss of employment or reassignment of duties.²¹⁸ The Authority reasoned that OMB Circular No. A-76 is a "rule" or "regulation" within the meaning of 5 U.S.C. Sec. 7103(a)(9)(C)(ii), subject to enforcement through grievance arbitration, as the circular is an official declaration of policy which is binding upon federal agencies

²¹⁶. See Kelter, Federal Employee Challenges to Contracting out: Is There a Viable Forum?, 111 Mil.L.Rev. 103 (1986) (contains an exhaustive analysis of the issues underlying the negotiability of proposals relating to contracting out).

²¹⁷. American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 F.L.R.A. 3 (1982), enforced sub. nom. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed 106 S.Ct. 1678 (1986) (per curium); American Federation of State, County and Municipal Employees, Local 3097 and Department of Justice, Justice Management Division, 31 F.L.R.A. 322 (1988). C.f. National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 F.L.R.A. 574 (1981) (A requirement that an agency comply with a specific provision of OMB Circular No. A-76 by including portions of the circular in the bargaining agreement was found nonnegotiable as the proposal would require management to comply with the provision even if the circular would change during the life of the agreement), aff'd National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority, 681 F.2d 886 (D.C. Cir. 1982).

²¹⁸. National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 27 F.L.R.A. 976, 978 (1987), aff'd in part and rev'd in part Internal Revenue Service v. FLRA, 862 F.2d 880 (D.C. Cir. 1988).

and officials even if the circular is not incorporated generally into the collective bargaining agreement between the parties.²¹⁹ In essence the Authority has reasoned that such clauses are superfluous. Additionally, the Authority held that proposals which require agencies to comply with OMB Circular No. A-76 are negotiable as procedures pursuant to 5 U.S.C. Sec. 7106(b)(2).²²⁰

After reviewing the legislative history underlying the grievance system required by 5 U.S.C. Sec. 7121 to be included in collective bargaining agreements, the Authority concluded that since contracting out was not among the matters specifically excluded from grievance arbitration that issues relating to contracting out could properly be examined by an arbitrator to ensure compliance with applicable laws, rules, and regulations.²²¹ The Authority has limited an arbitrator's power to review contracting out decisions to ensure compliance with applicable laws and regulations. If the arbitrator determines that the contracting out action was done impermissibly the arbitrator does not have authority to cancel a contract or to award a contract to a specific firm but can only direct that the agency reconstruct the procurement action in

²¹⁹. American Federation of State, County, And Municipal Employees, Local 3097 and Department of Justice, 31 F.L.R.A. 324, 332-334, 343-344 (1988).

²²⁰. Id., at 340-344.

²²¹. Id., at 335-337; National Treasury Employees Union and United States Department of Treasury, Bureau of Public Debt, 32 F.L.R.A. 975, 979-980 (1988).

compliance with applicable laws and regulations.²²²

The courts of appeals have split on the negotiability of proposals which require an agency to comply generally with OMB Circular No. A-76. The Court of Appeals for the District of Columbia Circuit has found proposals of this nature negotiable, including subjecting contracting out decisions to arbitration pursuant to the parties' grievance procedure.²²³ However, the court recently found nonnegotiable a proposal which would prohibit the agency from awarding a contract when it had decided to contract out until all grievance procedures had been exhausted as it impermissibly infringed upon management's substantive authority to contract out and could compromise the agency's ability to accomplish its mission.²²⁴

The Fourth Circuit has found proposals requiring compliance with OMB Circular No. A-76 when contracting out to be nonnegotiable as they encroach upon management's prerogatives and would conflict with a government-wide directive.²²⁵ The court concluded that Congress intended federal agencies to have very broad authority to contract

²²². Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 F.L.R.A. 656, 656, 661-662 (1986).

²²³. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984).

²²⁴. Department of Treasury, Internal Revenue Service v. Federal Labor Relations Authority, 862 F.2d 880 (D.C. Cir. 1988), petition for cert. filed 28 June 1989, rev'd in part National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 27 F.L.R.A. 976 (1987) (Proposal 2).

²²⁵. United States Department of Health and Human Services v. Federal Labor Relations Authority, 844 F.2d 1087 (4th Cir. 1988) (en banc), rev'd American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, 22 F.L.R.A. 1071 (1986).

out and that Congress did not envision subjecting an issue so critical to management's ability to manage to collective bargaining.²²⁶ The court reasoned that the proposal would potentially divest management of its right to contract out and place the authority in the hands of arbitrators. The court examined the provisions of the circular in detail and found that it was a managerial document which requires agency management to exercise their judgment extensively in determining whether to contract-out an activity and if subject to the parties' grievance procedure it would thereby subject the exercise of management's discretion to substantive review by arbitrators.²²⁷ The court was also concerned with the delays which could result if management's contracting-out decisions were subject to review in the negotiated grievance procedure.²²⁸

The Fourth Circuit also examined the proposal to see if it was merely a procedure for the exercise of a management right or whether it infringes upon the substantive right of management. The court properly concluded that the proposal would result in arbitrators reviewing the substantive exercise of management's right to contract-out and that this "cannot be considered anything but substantive."²²⁹ The court rejected the Authority's determination

226. Id., at 1090-1092.

227. Id., at 1091-1093.

228. Id., at 1094; See Dept. of Treasury v. FLRA, 862 F.2d 880 (D.C. Cir. 1988) (finding nonnegotiable that contracting-out actions not be undertaken until all grievance procedures exhausted).

229. HHS v. FLRA, 844 F.2d at 1097.

that even in the absence of the proposal an agency's contracting-out actions are subject to the grievance procedure as such a reading of the Act is contrary to 5 U.S.C. Sec. 7106(a) which provides that "nothing in this chapter shall affect" managements right to contract out. The court determined that this language exempts the exercise of management rights from arbitrable review.²³⁰

The Fourth Circuit also provided as an additional reason for nonnegotiability in that the proposal conflicts with OMB Circular No. A-76, a government-wide regulation, which provides that it does not create any rights enforceable by others and which contains an exclusive appeal procedure which cannot be subject to negotiation or arbitration.²³¹

The Ninth Circuit has also found nonnegotiable a proposal which would permit a union to review and challenge cost studies used in determining whether to contract out.²³² The court found that this impermissibly infringed upon management's substantive right to contract out as permitting an arbitrator to review contracting out decisions could result in an arbitrator substituting their judgment for managements in an area which requires "questions of judgment requiring close analysis and nice choices."²³³ Additionally, the

²³⁰. Id. at 1098.

²³¹. Id., at 1099.

²³². Defense Language Institute v. Federal Labor Relations Authority, 767 F.2d 1398 (9th Cir. 1985), cert. dismissed 106 S.Ct. 2004, 90 L.Ed. 2d 647 (1986).

²³³. Id., at 1401 (quoting Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318, 78 S.Ct. 752, 757, 2 L.Ed.2d 788 (1958)).

court expressed concern that the operative effect delays resulting from grievances would divest management of its ability to contract out.²³⁴ .

The soundness of the current Authority rule is clearly questionable as it allows a third party to substitute their judgment for agency management in making determinations as to contracting out, an area which requires an agency to exercise broad discretion in selecting how to accomplish its mission. It is likely that this issue will be resolved by the Supreme Court as the court has already shown interest in the issue when it granted certiorari in a case only to later dismiss it because the arguments asserted by the agency had not been properly asserted before the Authority.²³⁵

IX. PERMISSIVE SUBJECTS OF BARGAINING

Permissive subjects of bargaining include the number, types, and grades of employees or positions below the agency level assigned to any organizational subdivision, work project, or tour of duty, and the technology, means and method of performing work.²³⁶ Management is permitted to determine whether or not it desires to bargain over these subjects. Even if an agency begins to negotiate on a permissive subject it is under no duty to reach agreement on the subject and can

²³⁴. Defense Language Institute v. Federal Labor Relations Authority, 767 F.2d at 1401.

²³⁵. Equal Employment Opportunity Commission v. Federal Labor Relations Authority, (cert. dismissed), 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 29 (1986).

²³⁶. 5 U.S.C. Sec. 7106(b)(1).

withdraw the issue from the bargaining.²³⁷ Bargaining over procedures and appropriate arrangements for adversely affected employees is required when management acts as to these permissive subjects.²³⁸

The Authority employs a two-step analysis to determine whether a proposed procedure is a permissive subject of bargaining. Initially the Authority asks whether there exists a "direct and integral relationship" between the agency's proposed practice and the accomplishment of the agency's mission.²³⁹ If this is answered affirmatively the Authority then asks whether the counter-proposal advanced by the union would "directly interfere" with the mission-related purpose of the agency's new practice.²⁴⁰ If both of these inquiries are answered affirmatively the agency is under no obligation to bargain.²⁴¹

"Performing work" are those matters which directly and integrally relate to the accomplishment of the mission of the

²³⁷. American Federation of Government Employees, Local 3669, AFL-CIO and Veteran's Administration Medical Center, Minneapolis, Minnesota, 2 F.L.R.A. 641, 643 n.4 (1980).

²³⁸. Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employees, Local R7-23, 33 F.L.R.A. 532, 543 (1988).

²³⁹. United States Department of Justice, Immigration and Naturalization Service, 31 F.L.R.A. 145, 152-153 (1988).

²⁴⁰. American Federation of Government Employees, AFL-CIO, Local 1625 and Department of the Navy, Naval Air Station, Oceana, Virginia, 25 F.L.R.A. 1028, 1031 (1987).

²⁴¹. Id.

agency.²⁴² The Authority has defined "means" as any instrumentality, including an agent, tool device, measure, plan or policy used by the agency for the accomplishing or the furthering of the performance of its work.²⁴³ "Methods" is defined as the way in which an agency performs its work.²⁴⁴ To constitute a means of performing work an agency must establish a direct and integral relationship between the particular instrumentality and the performance of an agency's work.²⁴⁵ To sustain a claim that a proposal directly interferes with management's right to determine technology the agency must establish the technological relationship of the proposal to accomplishing or furthering the performance of an agency's work and demonstrate that the proposal will interfere with the purpose for which the technology was adopted.²⁴⁶

^{242.} American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 F.L.R.A. 604, 618 (1980).

^{243.} National Treasury Employees Union and United States Customs Service, Region VIII, San Francisco, California, 2 F.L.R.A. 255, 258 (1979), aff'd sub nom. New York Council of Civilian Technicians v. Federal Labor Relations Authority, 757 F.2d 502 (2d Cir. 1985), cert. denied, 474 U.S. 846, 106 S.Ct. 137, 88 L.Ed.2d 113 (1985).

^{244.} National Treasury Employees Union and Internal Revenue Service, Los Angeles District, 32 F.L.R.A. 182 (1988), petition for review filed sub nom., Internal Revenue Service, Los Angeles District v. Federal Labor Relations Authority, No. 88-1550 (D.C. Cir. July 29, 1988).

^{245.} United States Department of Justice, Immigration and Naturalization Service, Washington, D.C. and American Federation of Government Employees, National Border Patrol Council, AFL-CIO, 31 F.L.R.A. 145, 152 (1988).

^{246.} American Federation of Government Employees, AFL-CIO, National Council of Social Security Field Office Locals and Department of Health and Human Services, Social Security

Clothing worn by correctional officers,²⁴⁷ wearing of military uniforms by National Guard civilian technicians,²⁴⁸ equipment provided to employees to perform their duties,²⁴⁹ and office space allocation,²⁵⁰ have all been found to be fall within the technology, means, or method of performing work. An example of the Authority's willingness to readily find a proposal as a methods or means of performing work is its treatment of the proposals concerning the methods in which pay is distributed to an agency's employees. Initially, the Authority held that the manner in which an agency

Administration, 24 F.L.R.A. 842, 846-847 (1985).

²⁴⁷. United States Department of Justice, Kennedy Center, Federal Correctional Institution, Bureau of Prisons, 29 F.L.R.A. 1471 (1987), enforced American Federation of Government Employees, Local 2441 v. Federal Labor Relations Authority, 864 F.2d 178 (D.C. Cir. 1988)

²⁴⁸. Division of Military and Naval Affairs, State of New York, Albany, N.Y. and New York Council, Association of Civilian Technicians, 15 F.L.R.A. 288 (1984) (uniforms foster military discipline and encourages esprit de corps and enhances the identification of the National Guard as a military unit).

²⁴⁹. Social Security Administration, 11 F.L.R.A. 576 (1983) (proposal to require each employee have their own telephone); Mine Safety and Health Administration, 21 F.L.R.A. 1046 (1986) (proposal requiring the agency to provide a sufficient number of telephones to accomplish the agency mission).

²⁵⁰. Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-44 and Naval Underwater Systems Center, Newport, Rhode Island and Naval Underwater Systems Center, Newport, Rhode Island, 28 F.L.R.A. 352 (1987) (nonnegotiable where agency met its burden of demonstrating that its selection of office space design had a technological relationship to accomplishing its work and that the union proposal would interfere with the purposes for which the offices were designed); But see National Treasury Employees Union and Department of Health and Human Services, Family Support Administration, 28 F.L.R.A. 1108, 1109-1111 (1987) (agency failed to meet its burden that office space and office mate selection would interfere with the purposes for which the offices were designed).

delivered paychecks to its employees was a means or method of performing work and therefore a permissive subject of bargaining because the presence of a dedicated workforce could only be ensured when the agency meets its payroll obligations.²⁵¹ On review the Ninth Circuit rejected the Authority's reasoning as it would eviscerate the obligation to bargain if any benefit to an employee is a way of retaining a stable and committed workforce thereby constituting a means of work.²⁵² The Authority yielded to the Ninth Circuit's ruling and held that the method of paycheck delivery was not a means or method of performing work and that it was therefore a mandatory subject of bargaining.²⁵³

The Authority has issued numerous opinions on the negotiability of changes in working hours.²⁵⁴ The Authority recently settled the issue by finding that any change in an employee's work hours is a change in their tour of duty and therefore a permissive subject of

²⁵¹. Federal Employees Metal Trades Council, AFL-CIO and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 16 F.L.R.A. 619 (1984); American Federation of Government Employees, Local 1533 and Department of Navy, Navy Commissary Store Region, Oakland, and Navy Commissary Store, Alameda, California, 16 F.L.R.A. 623 (1984).

²⁵². Federal Employee Metal Trades Council v. Federal Labor Relations Authority, 778 F.2d 1429 (9th Cir. 1985).

²⁵³. Federal Employees Metal Trades Council, AFL-CIO and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 25 F.L.R.A. 465 (1986).

²⁵⁴. See Speck, 5 U.S. Code 7106(b)(1): Tour Be Or Not To Be, 88 Fed. Lab. Rep. V-49 (1988).

bargaining.²⁵⁵ This decision adds certainty to an area which previously was confusing to many involved in labor-management relations in the federal sector and therefore is an example of the Authority fulfilling its responsibility to provide guidance.²⁵⁶ The Authority abandoned its prior practice of finding nonnegotiable changes which were integrally related to and determinative of the number, types and grades of employees assigned to organizational subdivisions, work projects or tours of duty²⁵⁷ and finding negotiable those proposals which related to relatively minors changes in the starting and finishing times for an established tour of duty²⁵⁸ recognizing that such distinctions are frequently difficult to draw.²⁵⁹ However, it must be remembered that the procedures and appropriate arrangements for adversely affected

255. Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employees, Local R7-23, 33 F.L.R.A. 532, 541-545 (1988) (the Authority placed significant weight on the fact that 5 C.F.R. Sec 610.102(h) defines a tour of duty as the hours of a day and the days of a week that constitute an employee's regularly scheduled administrative workweek).

256. 5 U.S.C. Sec. 7105(a) (1982).

257. National Federation of Federal Employees, Local 1461 and Department of the Navy, United States Naval Observatory, 16 F.L.R.A. 995 (1984); United States Customs Service, Region V, New Orleans, Louisiana and National Treasury Employees Union, 9 F.L.R.A. 116 (1982).

258. National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 F.L.R.A. 927, 930 (1979).

259. Department of the Air Force, Scott Air Force Base, Illinois and National Association of Employees, Local R7-23, 33 F.L.R.A. 532, 542 (1988).

employees must be bargained before implementation.²⁶⁰ Additionally, bargaining concerning alternative work schedules as authorized by the Flexible and Compressed Work Schedules Act, 5 U.S.C. Sec. 6120-33 (1982 & Supp. V 1987) is mandatory.²⁶¹

X. SPECIFIC NEGOTIABILITY ISSUES

Several court and Authority decisions have been rendered on proposals concerning payment of union officials salaries, travel expenses, and per diem expenses for their bargaining and representational activities by the federal agency. 5 U.S.C. Sec. 7131 provides that employees representing an exclusive representative in the negotiation of a collective bargaining agreement shall be authorized "official time" for such purposes if they would otherwise be in a duty status. Initially, the Authority issued guidance which required federal agencies to pay salaries, travel expenses, and per diem expenses to union representatives engaged in collective bargaining with federal agencies.²⁶² The Supreme Court subsequently determined that the Authority exceeded its authority in issuing this guidance as to the extent that it required payment of travel and per

²⁶⁰. Id. at 543.

²⁶¹. National Federation of Federal Employees, Local 642 and Bureau of Land Management, Lakeview District Office, Lakeview, Oregon, 27 F.L.R.A. 862 (1987), enforced Bureau of Land Management, Lakeview, Oregon v. Federal Labor Relations Board, 864 F.2d 89 (9th Cir. 1988).

²⁶². Interpretation and Guidance, Case Nos. O-PS-3 and O-PS-6, 2 F.L.R.A. 265 (1979).

diem expenses.²⁶³ However, the court indicated that negotiations could presumably occur over whether the agency would make such payments to union officials engaged in collective bargaining.²⁶⁴ Upon remand from the Supreme Court, the Authority determined that a proposal relating to payment of travel and per diem expenses was negotiable where the expenses were incurred at the convenience of the agency or was otherwise in the primary interest of the government.²⁶⁵ The Authority has went so far as to find proposals which call for a limited number of employees to be granted 100 percent official time to perform union responsibilities negotiable.²⁶⁶

The negotiability of pay of federal employees whose pay is not specifically established by statute is unsettled as several courts of appeals have split on this issue. It is likely that this issue will ultimately make its way to the Supreme Court for resolution.

The Authority has held that where an agency has discretion to determine wages and other economic related benefits these issues are negotiable unless the agency's discretion is "sole and exclusive" or

²⁶³. Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 104 S.Ct. 439, 78 L.Ed.2d 195 (1983).

²⁶⁴. Id., at 464 U.S. 107 n. 17, 104 S.Ct. at 449 n. 17.

²⁶⁵. National Treasury Employees Union and Department of the Treasury, United States Custom Service, 21 F.L.R.A. 6 (1986), enf'd Department of the Treasury, United States Custom Service v. Federal Labor Relations Authority, 836 F.2d 1381 (D.C. Cir. 1988).

²⁶⁶. Overseas Federation of Teachers and Department of Defense Dependent Schools, Mediterranean Region, APO, New York, 21 F.L.R.A. 640 (1986) (proposal to grant 100 percent official time to two employees where agency did not show that it would have to hire replacements for the employees).

the agency has a compelling need for the employment practices in issue.²⁶⁷ The Authority has found substantive proposals regarding pay are nonnegotiable if they relate to a matter specifically provided for by federal statute.²⁶⁸

The Second Circuit upheld the Authority in finding that the Army had an obligation to bargain with the West Point Elementary School Teacher's Association over the teacher's salary schedule.²⁶⁹ The court agreed with the reasoning of the Authority that pay does constitute a condition of employment which must be bargained over unless the matter is specifically provided for by federal statute. As 20 U.S.C. Sec. 241 only requires that the cost-per-pupil of educating children living on federal property be comparable to those in the surrounding community and does not specifically provide teacher compensation the court found the issue negotiable. The court also deferred to the Authority's findings that a compelling need did not exist for an Army regulation which mandated pay comparability with local communities to the maximum extent possible and that the Army did not meet its burden of demonstrating that this proposal

²⁶⁷. Fort Stewart Association of Educators and Fort Stewart Schools, 28 F.L.R.A. 547 (1987); Fort Knox Teacher's Association and Fort Knox Dependents Schools, 28 F.L.R.A. 179 (1987).

²⁶⁸. American Federation of Government Employees, AFL-CIO, Council of Federal Grain Inspection Locals and United States Department of Agriculture, Federal Grain Inspection Service, Washington, D.C., 3 F.L.R.A. 530 (1980), aff'd sub nom. American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority, 653 F.2d 669 (D.C. Cir. 1981).

²⁶⁹. West Point Elementary School Teachers v. Federal Labor Relations Authority, 855 F.2d 936, 942-944 (2nd Cir. 1988).

would interfere with its right to determine its budget.²⁷⁰ The Eleventh Circuit applied similar reasoning in finding in another case that wages and other fringe benefits of teachers employed by the Army were negotiable.²⁷¹

The Fourth Circuit upheld the Authority's determination that the Nuclear Regulatory Commission (NRC) was obligated to negotiate over a salary proposal which would require employee salaries to be adjusted for the cost of living/comparability factor.²⁷² Pursuant to 42 U.S.C. Sec. 2201(d) the NRC is not required to pay its employees pursuant to Congressionally set schedules when it deems such action necessary. The Authority determined this discretion placed in the agency also required it to negotiate with its employees over wages as the matter was not specifically provided for by statute. The Fourth Circuit deferred to the Authority's interpretation of the Act that wages are negotiable unless specifically provided for by statute as it found the legislative history of the Act to be ambiguous on the issue and that it would further the Act's avowed policy of encouraging collective bargaining if wages was included within conditions of employment.²⁷³

²⁷⁰. Id., at 942.

²⁷¹. Fort Stewart Schools V. Federal Labor Relations Authority, 860 F.2d 396 (1988), reh'g en banc denied, 862 F.2d 1502 (1989), aff'g Fort Stewart Association of Educators and Fort Stewart Schools, 28 F.L.R.A. 547 (1987).

²⁷². Nuclear Regulatory Commission v. Federal Labor Relations Authority, 859 F.2d 302 (4th Cir. 1988), reh'g en banc granted 866 F.2d 661 (1989).

²⁷³. Id., at 308-309.

In a case concerning pay for civilian employees of the Military Sealift Command the Third Circuit has rejected the Authority's finding that wages and fringe benefits are negotiable when left to agency discretion unless the agency's discretion is "sole and exclusive" or the agency has a "compelling need" for the employment practice at issue.²⁷⁴ The Navy determines pay for its civilian employees pursuant to the prevailing wage system with discretion to deviate from the private sector prevailing wage when consistent with with the public interest.²⁷⁵ Pursuant to this statutory authority the Navy has established a procedure for determining the wages of its civilian mariners which not only considers the prevailing wage but also considers the effects its wages will have on the private sector and how the wages will affect its overall costs.²⁷⁶ The court conducted an in-depth analysis of the legislative history of the Act to determine whether the instant proposals were negotiable. emphasized were statements in the legislative history that the scope of bargaining would not be extended to permit bargaining over wages.²⁷⁷ Of particular importance was the fact that Congress

²⁷⁴. Department of the Navy, Military Sealift Command v. Federal Labor Relations Authority, 836 F.2d 1409 (3rd Cir. 1988) rev'd National Maritime Union of America and Department of the Navy, Military Sealift Command, 25 F.L.R.A. 105 (1987).

²⁷⁵. 5 U.S.C. Sec. 5348(a) (1982).

²⁷⁶. Military Sealift Command v. FLRA, 836 F.2d 1412-1413.

²⁷⁷. House Report accompanying H.R. 11280 at 12, Legislative History at 682 ("federal pay will continue to be set in accordance with the pay provisions of title 5"); Supplemental Views to H.R. 11280, House Report at 377, Legislative History at 721 ('Among the bargaining rights not included in the bill are: ... (2) The right to bargain collectively over pay and money-related fringe benefits such as retirement benefits and life and health insurance....'); S.Rep. No.

specifically provided a grandfather clause in the Act²⁷⁸ allowing prevailing rate employees authorized to bargain over wages and other employment benefits prior to August 19, 1972, who were permitted under Section 9(b) of the Prevailing Rate Act to negotiate concerning these issues, to continue to negotiate over these matters. The court soundly reasoned that there would be no need for this grandfather clause if all prevailing wage employees were entitled to bargain on these issues.²⁷⁹ Additionally the court found support that wages are not conditions of employment as the Act distinguishes "pay and pay practices" from conditions of employment in 5 U.S.C. Sec 5343.²⁸⁰

The Court of Appeals for the District of Columbia Circuit followed the decision of the Third Circuit in finding nonnegotiable a proposal regarding wages where the agency had discretion under the Prevailing Rate Act to adjust wages consistent with the public

95-969, 95th Cong., 2d Sess. 12-13(1978), U.S. Code Cong. & Admin. News, 1978, pp. 2723, 2734-35; Legislative History at 749-50 (The bill permits unions to bargain collectively... It excludes bargaining on economic matters..."); statement of Congressman Clay, 124 Cong. Rec. E4293 (daily ed. Aug. 3, 1978); Legislative History at 839 ("I also want to assure my colleagues that there is nothing in this bill which allows federal employees the right to ... negotiate over pay and money-related fringe benefits"), Congressman Udall, author of amended version of H.R. 11280 which became Title VII, 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978); Legislative History at 923 ("not really any argument in this bill or this title about Federal collective bargaining for wages and fringe benefits... All these major regulations about wages ... will continue to be established by law").

278. 5 U.S.C. Sec. 5343 (1982).

279. Military Sealift Command v. FLRA, 836 F.2d at 1419.

280. Id., at 1420.

interest.²⁸¹ The Authority has accepted the finding that Prevailing Rate Act employees are not entitled to bargain over wages except to the extent of the grandfather clauses in the Act and the Prevail Rate Act.²⁸²

The Court of Appeals for the District of Columbia Circuit found nonnegotiable a wage proposal for teachers employed overseas by the Department of Defense.²⁸³ The court framed the primary issue as whether Congress intended wages to be included within the conditions of employment subject to bargaining as Congress clearly made the scope of bargaining narrower in the public sector than it is in the private sector. Examination of the Overseas Pay Act reveals that in separate statutory provisions the Secretary of Defense was given authority to promulgate regulations concerning compensation and conditions of employment.²⁸⁴ Congress provided in Section 5343 of the Act for continuation of bargaining over economic issues by "prevailing wage rate" employees who had previously engaged in such bargaining thereby recognizing a distinction exists between wages and

²⁸¹. Department of the Treasury, Bureau of ENgraving and Printing v. Federal Labor Relations Authority, 838 F.2d 1341 (D.C. Cir. 1988).

²⁸². American Federation of Government Employees, AFL-CIO and Department of Defense, Departments of the Army and Air Force, Headquarters Army and Air Force Exchange Service, Dallas, Texas, 32 F.L.R.A. 545 (1988) (finding nonnegotiable a proposal relating to the commission rate paid to mechanics employed by the agency).

²⁸³. Department of Defense Dependents Schools v. Federal Labor Relations Authority, 863 F.2d 988 (D.C. Cir. 1988), reh'g en banc granted 6 Feb 89.

²⁸⁴. Id., at 991 comparing 20 U.S.C. Sec. 902(a)(4) and 20 U.S.C. Sec. 902(a)(6).

conditions of employment when using these terms in the Act.²⁸⁵ The Court then examined the legislative history of the statute²⁸⁶ finding further support that Congress did not intend for bargaining over wages by federal employees except to the extent permitted for certain Prevail Rate Act employees.²⁸⁷

The Authority should reconsider its current policy of finding negotiable economic issues not specifically provided for by federal statute. A review of the legislative history of the Act does not support a finding that it was the intent of Congress in passing this legislation to make these issues negotiable. As detailed above, the vast majority of statements contained in the legislative history clearly indicate that it was not envisioned that these issues would be negotiable. The grandfather clause allowing bargaining over these issues for certain employees under the prevailing wage rate system strongly suggests that as to other employees these issues are not within the "conditions of employment" subject to bargaining. The current split in the circuits must be resolved as this issue is critical to all parties involved in federal labor-management relations. If the Authority were to reverse its current policy, it is possible that the circuits which have deferred to its decision finding these matters negotiable would sustain its change in position finding these matters nonnegotiable. If not, this is an issue which is ripe for consideration by the Supreme Court to

²⁸⁵. Id., at 991-992.

²⁸⁶. See Note 277 supra.

²⁸⁷. DoDDS v. FLRA, 863 F.2d at 993.

resolve.

XI. CONCLUSION

The scope of negotiability in the federal sector is murky and difficult to understand. Although it can clearly be said that the scope of bargaining is narrower than in the private sector, it is often difficult to determine whether a specific proposal will be found to be negotiable. All too often, the changing of a single word in a proposal or the reasons provided for or against the negotiability of the proposal by the union or agency will determine the negotiability of an issue. Although a decade has passed since enactment of the Act, many negotiability issues remained unresolved. Up to this point in the time the Authority has failed in its responsibility to provided guidance and leadership in this area. This is evident from the fact that the parties engaged in federal sector bargaining do not consider the Authority the final arbiter of negotiability issues as they routinely appeal decisions of the Authority to the courts of appeals for resolution. Due to the inability of the Authority to render decisions in a consistent, predictable manner, supported by sound rationale and justification, the courts frequently reverse the Authority despite the degree of deference the courts are required to give to decisions of the Authority.

The Authority has not had a quorum since October, 1988, and consequently has not issued any opinions since this time. Therefore, the current member and the individuals to be appointed to

the Authority are presented with an opportunity to provide the leadership and guidance Congress expected of them when the Act was passed. . The Authority should approach its responsibility of rendering negotiability opinions focusing upon its duty of providing leadership to those engaged in federal labor-management relations. When rendering opinions the Authority must concentrate upon providing standards which will allow all involved parties to predict with some degree of certainty, a task now nearly impossible, the negotiability of similar proposals. The Authority should carefully consider whether it will continue to adhere to the "acting at all" and "direct interference" standards as they have shown themselves to be unworkable. The Authority should develop a standard for negotiability which places primary emphasis upon the practical effects a proposal will have on the agency in determining whether the proposal is negotiable.